SKELTON BOUNDARIES AND ADJACENT PROPERTIES

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THE LEGAL ELEMENTS OF BOUNDARIES AND ADJACENT PROPERTIES

By

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TO

SAMUEL EBEN BARNEY

WHOSE INSPIRING INSTRUCTION GAVE GENERATIONS OF YALE MEN AN UNDERSTANDING OF ENGINEERING AS THE APPLICATION OF MATHEMATICS TEMPERED BY JUDGMENT AND COMMON SENSE, THIS BOOK IS GRATEFULLY DEDICATED.

PREFACE

There are many excellent texts dealing with the mathematical aspects of surveying, but few giving in concise form the basic legal principles underlying its application to the location of boundaries. The need of a book that will give to the lawyer who w ites deeds and to the engineer who attempts to lay down the lines of a property, the mathematics and law involved is evident to all who are engaged in surveying.

It is therefore the purpose of this book to bring to the engineer an appreciation of the legal elements of boundary surveying and to the attorney a realization of the fact that the prevention of boundary disputes can only be attained by the application of modern methods of controlled surveying. As regards real property the service rendered a community by these professions may be measured by the infrequency of litigation, and cooperation is essential to reduce misunderstanding to a minimum.

The majority of cases discussed are the direct result of indifferent conveyancing, and the reader should study the text primarily so that he may prepare a deed in compliance with the common understanding of the parties to the transaction, and in a manner which will preclude its construction ever coming before the court for interpretation.

Ray Hamilton Skelton

University of Maryland,
June 10, 1930

TABLE OF CONTENTS

CHAPTER I

BOUNDARY CONTROL

Section

I. Scope and Purpose 1

II. Deed Descriptions.

(A) Requisites of a Valid Description 2
(B) General Descriptions 3
(C) Particular Descriptions 4
(D) General and Particular 5
(E) Construction of Deed Descriptions.
(1) Deeds to be Construed against Grantor 6
(2) Ownership an Aid in Interpretation 7
(3) Reference to Other Instruments.
(a) General 8
(b) Effect.
(1) Extension of Grant 9
(2) Limitation of Grant 10
(3) Reference for Source of Title Only 11
(4) Reference Erroneous 12
(F) Reference to Plats.
(1) General 13
(2) Effect of Unconformity of Plat to Statutes 14
(G) Repugnancy.
(1) General 15
(2) Rejection of the False 16
(3) Limitations 17
(H) Deed Descriptions As Basic Data of a Survey.
(1) General 18
(2) Types of Descriptions.
(a) General 19
(b) Descriptions Containing No Quantitative Data 20
(c) Descriptions Containing Worthless Data 21
(d) Deeds Containing Quantitative Data Necessitating only Reasonable Presumptions 22
(e) Deeds Containing Complete Data 23

Section

(J) Deed Descriptions Lacking Quantitative Data Are Worthless 24
(K) Mathematics Essential in Writing in Deed Descriptions..... 25

III. Methods of Controlling Boundaries.

(A) General 26
(B) The Legal Method.
(1) Foundation 27
(2) Characteristics and Limitations..... 28
(C) The Engineering Method.
(1) Development 29
(2) Accuracy 30
(3) Elimination of Error..... 31
(4) Application.
(a) Cost 32
(b) Necessity 33
(5) Advantages.
(a) General 34
(b) Deed Descriptions Rendered Simple..... 35
(c) Public Monuments More Enduring than Private 36
(d) Public Monuments More Certainly Identified.... 37
(e) Public Monuments in Better Harmony than Private 38
(f) Horizontal Control Affords Means of Stabilizing and Coordinating Private Monuments..... 39
(g) Permits Construction of Cadastral Map..... 40
(h) Accuracy Encouraged 41
(6) Disadvantages.
(a) Knowledge of Mathematics Necessary..... 42
(b) Adjustment Necessary 43
(c) Time Necessary for Complete Control..... 44
(7) Legal Foundation for Controlled Surveys..... 45
(8) Availability 46
(9) Present Use 47

IV. The Writing of Deed Descriptions.

(A) General 48
(B) Rule for Writing Deed Descriptions..... 49
(C) Point of Beginning.
(1) Selection 50
(2) Simplicity Desirable 51
(3) Point Must Be Definite..... 52
(4) Point of Beginning Should be Actual and Should be Referenced 53

Section

(D) The Boundary Lines.
(1) General 54
(2) Direction 55
(3) Distance 56
(4) Direction and Distance Must Both Be Given..... 57
(E) Examples of Description.
(1) In a Controlled Area..... 58
(2) In an Uncontrolled Area..... 59

CHAPTER II

RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS

Section

I. Control of Intention.
(A) The Rule 65
(1) Method of Application..... 66
(2) Effect of Conflict..... 67
(3) Parol and Extrinsic Evidence as Aids..... 68
(4) Parol and Extrinsic Evidence as Explanation..... 69
(5) Limitation of Parol and Extrinsic Evidence..... 70
(B) Basic Rule To Determine Intention.
(1) Foundation and Purpose..... 71
(2) The Rule 72
(3) Limitations 73
(4) Effect of Local Conditions..... 74
(C) Surveying Methods Based on Rules of Construction.
(1) Foundation 75
(2) The Rule 76

II. Control of Lines Marked and Surveyed.
(A) Over Natural Monuments.
(1) The Rule 77
(2) Application 78
(3) Considerations Essential to Render Rule Operative.... 79
(B) Over Maps and Plats.
(1) General 80
(2) The Rule 81
(3) Application 82
(4) Considerations Essential to Render Rule Operative..... 83
(C) Over Adjoiners.
(1) The Rule 84
(a) Effect of Adjoiner Being Marked or Unmarked 85
(b) Effect of Relative Certainty and Possible Error 86
(2) Considerations Essential to Render Rule Operative..... 87

Section

(D) Over Course and Distance.
(1) The Rule 88
(2) Application 89
(3) Considerations Essential to Render Rule Operative..... 90
(E) Over Quantity 91

III. Control of Natural Monuments.
(A) General 92
(B) Definition and Requisite Properties..... 93
(C) Classification 94
(D) The General Rule..... 95
(E) Application 96
(F) Exceptions.
(1) General 97
(2) Effect of Definite and Certain Description..... 98
(3) Effect of Evident Error..... 99
(4) Effect of Destruction..... 100
(G) Line of an Adjoiner as a Monument.
(1) The Rule 101
(2) Effect 101.1
(3) Application 102
(H) Over Artificial Monuments.
(1) The Rule 103
(2) Application 104
(3) Exceptions 105
(J) Over Plats and Maps.
(1) The Rule 106
(2) Applications 107
(3) Effect of Conflict..... 108
(4) Exceptions 109
(a) Effect of Intention..... 109
(b) Necessity of Call for Monument..... 110
(K) Over Course and Distance.
(1) The Rule 111
(2) Application.
(a) As Guide to Intention..... 112
(b) To Give Control to Certainty and To Harmonize Deeds 113
(3) Considerations Essential to Render Rule Operative..... 114
(4) Course and Distance as an Aid To Identity..... 115
(5) Exceptions.
(a) Necessity of Call..... 116
(b) Effect of Intention..... 117
(c) Effect of Evident Error..... 118

Section
(d) Effect of Local Conditions 119
(e) Effect of Relative Certainty 120
(L) Over Quantity 121
(M) Control as Between Several Monuments.
(1) The Rule 122
(2) Application.
(a) Survey from Original Corners 123
(b) Effect of Purpose of Monument 124
(c) Courses and Distance as Aids 125
(d) No Call for One Monument 126

IV. Control of Artificial Monuments.
(A) General 129
(B) Stakes as Artificial Monuments.
(1) General 130
(2) Identity an Important Factor 131
(3) Identity Aided by Evidence 132
(C) Stakes as Lines Marked and Surveyed 133
(D) The General Rule 134
(E) Over Plats.
(1) The Rule 135
(2) Application.
(a) Effect of Evident Error 136
(b) Effect of Practical Location 137
(c) Effect of Attendant Circumstances 138
(F) Over Adjoiners.
(1) The Rule 139
(2) Application 140
(3) Exceptions 141
(G) Over Courses and Distances.
(1) The Rule 142
(2) Reasons for and Strength of Rule 143
(3) Application.
(a) Effect of Survey from Original Stakes 144
(b) Effect of Corroborative Evidence 145
(c) Application to Party Walls.
(aa) General 146
(bb) Call Must be Locative 147
(cc) Call Must Fix Terminal 148
(dd) Rule Not General 149
(ee) Only Locative Distances Control 150
(3) Considerations Essential to Render Rule Operative 151
(4) Exceptions 152
(H) Over Quantity 153

Section

V. Control of Maps and Plats.

(A) Function 154
(B) The General Rule 155
(C) Application.
(1) Plat More Certain 156
(2) Plat Must Be Referred To 157
(3) Effect of Conflict With Notes 158
(D) Over Adjoiners.
(1) The Rule 159
(2) Application 160
(E) Over Courses and Distances.
(1) The Rule 161
(2) Application.
(a) Plat Controls Calls of Deed 162
(b) Plat Establishes Superior Monuments 163
(c) Effect of Established Adjoiner Being Unmarked 164
(F) Over Quantity.
(1) The Rule 165
(2) Application 166

VI. Control of Adjoiners.

(A) Over Course and Distance.
(1) The Rule 167
(2) Reasons for Rule.
(a) Best Evidence of Intention 168
(b) Least Liable to Error 169
(3) Application.
(a) Lines Marked 170
(b) Lines Unmarked.
(aa) Effect of Visibility 171
(bb) Invisibility May Be Overcome 172
(cc) Effect of Occupation 173
(dd) Effect of Intention 174
(4) Considerations Essential to Render Rule Operative.
(a) Line Must Be Called For in Deed 175
(b) Line Must Exist When Call Is Made 176
(c) Line Must Be Certain and Locative 176.1
(5) Exceptions.
(a) Effect of Intention and Error 177
(b) Effect of Necessity to Depart from Calls 178
(c) Effect of Actions of Parties at Time of Transaction 179
(d) Effect of Line Being Unmarked 180

Section

(B) Over Quantity.
(1) The Rule 181
(2) Application 182

VII. Metes and Bounds 182.1

VIII. Control of Course and Distance.
(A) General 183
(B) The Rule 184
(C) Application.
(1) Where No Superior Call is Made 185
(2) Where Location or Identity is Doubtful 186
(3) Where Call is Erroneous 187

IX. Control Between Course and Distance.
(A) General 188
(B) The Rule 189
(C) Application.
(1) Effect of One Element Being Uncertain 190
(2) Effect of Occupancy 191
(3) Effect of Evident Error 192
(4) Effect of Established Error 193
(D) Procedure to Adjust Survey Where Course and Distance Conflict.
(1) General 194
(2) Irrational Adjustment Throwing All Error Into Distance 195
(3) Rational Adjustment Changing Course or Distance as Circumstances Require.
(a) Control of Intention 196
(b) Situation Survey the Foundation of Adjustment 197
(c) Suggestions for Further Procedure 198
(E) Over Quantity.
(1) The Rule 199
(2) Application 200

X. Control of Quantity.
(A) General 201
(B) The Rule 202
(C) Effect of Words "More or Less" 203
(D) Effect of Local Conditions 204
(E) Applications.
(1) Where Superior Calls Are Not Set Forth 205

Section

(2) Where Quantity Determines Which of Two Lines is Intended 206
(3) Where Quantity is the Essence of the Contract 207
(4) Effect of Survey 208
(5) Where Quantity Establishes the Intention 209

XI. Relative Importance of Conflicting Grants.
(A) The Rule 210
(B) Exceptions 211

XII. Relative Importance of Conflicting Surveys 212

CHAPTER III

EXCESS AND DEFICIENCY

Section

I. The Rule 215

II. Reasons For the Rule 216

III. Conditions For Rule To Apply 217

IV. Limitations 218

V. Effect of Streets 219

VI. Effect of Improvements 220

VII. Effect of Irregularity in Plan.
(A) General 221
(B) Lot Not Dimensioned 222
(C) Lot Dimensioned but Irregular 223

VIII. Effect of Location of Discrepancy Being Established 224

IX. Effect of Reference to a Plat in Description By Metes and Bounds 225

X. Rule To Be Applied As Last Resort 226

CHAPTER IV

HIGHWAYS AND STREETS AS BOUNDARIES

Section

I. Fee Carried To Center.
(A) The Rule 230
(B) Reason for Rule 231

Section

(C) Effect of Manner of Establishment.
(1) General ... 232
(2) By Condemnation Proceedings ... 233
(3) By Dedication ... 234
(4) By Prescription ... 235
(D) Effect of Reference to Plat ... 235.1
(E) Conveyance by City or State ... 235.2
(F) Limitations and Modifications ... 236
(1) Grantor Must Have Fee in Highway ... 236
(2) Effect of Highway on Margin of Grantor's Land ... 237
(3) Effect of Highway along Shore ... 238
(G) Street as a Monument.
(1) Control of Intention ... 239
(2) Control over Course and Distance ... 240
(3) Effect of Failure to Mention Street ... 241
(H) Presumption Rebutted.
(1) General ... 242
(2) Effect of Call for Side Lines.
(a) General ... 243
(b) New Jersey Rule ... 244
(3) Highway Referred to But not Called For ... 245
(4) Street Not Opened or Vacated ... 246
(5) Private Ways ... 247

II. Location of Streets.

(A) Importance ... 248
(B) Effect of Establishment.
(1) By Statutory Proceedings ... 249
(2) By Dedication ... 250
(3) By Prescription ... 251
(C) The Rule ... 252
(D) Applications.
(1) Control of Street Monuments.
(a) General ... 253
(b) Necessity of Identification ... 254
(2) Control of Lines Run.
(a) General ... 255
(b) Effect of Conflict between Monuments and Improved Street ... 256
(c) Private Monuments ... 257
(3) Control of Lines in Adjacent Blocks ... 258
(4) Control of Lines of Continued Occupancy ... 259
(5) Control of Recognized Lines ... 260

Section

(6) Control of Maps.
(a) Evidence of Location ... 261
(b) Evidence of Intention ... 262
(c) Map as a Monument ... 263
(d) Map Yields to Actual Location ... 264
(e) Effect of Street Existing on Map Only ... 265
(f) Effect of Time Element ... 266

III. Relation Between Street and Private Boundaries.
(A) Private Boundaries Determined by Street as of Date of Deed ... 267
(B) Effect of Reestablishment of Street ... 268
(C) Side and Rear Lot Lines Fixed by Interior Lines of Block 269
(D) Effect of Call For Quantity.
(1) Satisfied by Center Line ... 270
(2) Satisfied by Side Lines ... 271

IV. Reversion.
(A) The Rule ... 272
(B) Effect of Manner of Establishment ... 273
(C) Special Application of the Rule ... 274
(D) Fee to be Taken by Extending Side Lines ... 275

CHAPTER V

RIPARIAN BOUNDARIES

Section

I. General ... 280

II. Law of State Governs.
(A) Navigable Waters ... 281
(B) Non-navigable Waters ... 282

III. Definitions ... 283

IV. Effect of Particular Calls.
(A) General ... 284
(B) Where Boundary is the Ocean or the Sea ... 285
(C) Where Boundary is a Lake or Pond ... 286
(D) Where Boundary is a River ... 287
(E) Where Bounded by Artificial Waters ... 288

V. Riparian Rights.
(A) General ... 289
(B) The Right of Access ... 290
(C) Right to Make and Reclaim Land Under Tidal Water ... 291

Section

(D) The Right to Accretion.
(1) General ... 292
(2) Ownership of Accretions ... 293
(3) Islands ... 294
(4) Effect of Erosion ... 295
(5) Effect of Artificial Aids ... 296
(6) Apportionment of Accretion ... 297
(E) Effect of Avulsion ... 298

VI. Power of State to Dispose of Public Rights ... 299

CHAPTER VI

ESTABLISHMENT

Section

I. General ... 305

II. Established Lines Distinguished From Marked Lines of Original Survey ... 306

III. By Agreement.
(A) Necessary Foundation ... 307
(B) Limitations ... 308
(C) Implied Agreement ... 309
(D) Who May Make Agreements ... 310
(E) Time and Consideration ... 311
(F) Effect ... 312

IV. By Estoppel.
(A) Foundation ... 313
(B) Operation.
(1) General ... 314
(2) Necessary Essentials ... 315
(3) The Controlling Factor ... 316
(4) Effect of Improvements ... 317
(5) Effect of Error or Ignorance of Misleading Party ... 318
(6) Effect of Misled Party Having Means of Knowledge 319

V. By Practical Location.
(A) Essentials ... 320
(B) Operation ... 321
(C) Effect ... 322

VI. Recognition and Acquiescence.
(A) Foundation ... 323
(B) Limitations ... 324
(C) Effect ... 325

Section

VII. By Submission to Arbitrators 326

VIII. By Private Survey 327

IX. By Statutory Proceedings 328

X. Formal Agreements Should Be Encouraged 329

CHAPTER VII

ADVERSE POSSESSION

Section

I. General 335

II. Necessary Elements.

(A) Actual Possession 336
(B) Open and Notorious Possession 337
(C) Exclusive Possession 338
(D) Hostile Possession 339
(E) Continuity 340

III. Interruption.

(A) Acts of Owner 341
(B) Acts of Claimant 342
(C) Acts of Third Party 343

IV. Color of Title.

(A) General 344
(B) Effect 345
(C) Good Faith 346

V. Against Whom Adverse Possession Does Not Run 347

VI. Who May Acquire Property By Adverse Possession 348

VII. Extent of Adverse Possession.

(A) Under Claim of Title 349
(B) Under Color of Title.
(1) Construction of Description 350
(2) Extent of Possession—General Rules 351
(3) Mixed Possession.
(a) General 352
(b) Constructive Possession of Overlap Always in Senior 353
(c) Constructive Possession in Junior Falsely Founded 354
(d) Lappage Must Be Actual 355

VIII. Right or Title Acquired 356

CHAPTER VIII

DEDICATION

Section

I. General 360

II. Capacity of Dedicator 361

III. Common-Law Dedication.

(A) Characteristics 362
(B) Acts Constituting Common-Law Dedication 363
(C) Intention to Dedicate a Necessary Element 364

IV. Statutory Dedication.

(A) General 365
(B) Nature of Statutory Dedications 366
(C) Requisites of Statutory Dedication 367

V. Acceptance.

(A) General 368
(B) Necessary Elements 369
(C) By General Public 370
(D) By Municipality 371
(1) Effect of Responsibilities 371
(2) Capacity of Accepting Body 372
(E) Acts Constituting Acceptance.
(1) General 373
(2) Statutory Regulations 374
(F) Extent 375

VI. Limitations 376

VII. Presumptions 377

VIII. Rights and Obligations.

(A) Of Dedicator 378
(B) Of Public 379
(C) Of Third Parties 380

IX. Revocation.

(A) Right to Revoke 380.1
(B) Acts Constituting Revocation 381
(C) Statutory Provisions 382
(D) Effect of Sales with Reference to Plat 383
(E) Effect of Imposed Conditions 384
(F) Effect of Statutory Dedication 385

Section

X. Abandonment.
(A) General 386
(B) Effect of Acceptance 387

XI. Misuse or Diversion.
(A) General 388
(B) Uses Which Are Diversions 389
(C) Uses Which Are Not Diversions 390
(D) Necessary Assent 391
(E) Proceedings to Prevent Change 392

XII. Dedication a Concern of the Community 393

CHAPTER IX

ADJOINING LAND OWNERS

Section

I. Rights and Duties.
(A) General 394
(B) Unskillful and Negligent Use 395
(C) Wrongful Use.
(1) General 396
(2) Blasting 397

II. Encroachments.
(A) General 398
(B) Nature 399
(C) Abatement 400

III. Right To Lateral Support.
(A) Land in Natural Condition 401
(B) Land with Buildings.
(1) General 402
(2) Right Acquired by Grant 403
(3) Right not Acquired by Prescription 404
(4) Support from Nonadjacent Land 405

IV. Right to Excavate.
(A) Adjacent Land in Natural Condition 406
(B) Buildings on Adjacent Land.
(1) General 407
(2) Interpretations of the Rule 408
(a) Ordinary Care and Skill Required 408
(b) Notice Necessary 409
(c) Shoring Not Required 410
(d) Effect of Statutory Regulation 411

Section

V. Liability For Dangerous Conditions 412

VI. Right To Light and Air 413

VII. Trees.

(A) Near the Line 414
(B) On the Line 415

VIII. Fences.

(A) Definition 416
(B) Sufficiency 417
(1) Common Law 417
(2) Statutory Provisions 418
(C) Partition Fences.
(1) Rights and Duties of Owners 419
(2) Location 420
(3) Ownership 421
(D) Removal and Destruction.
(1) Civil Liability 422
(2) Criminal Liability 423
(E) Spite Fences.
(1) Legality 424
(2) Statutory Regulation 425

IX. Party Walls.

(A) Definition and Nature of Ownership 426
(B) Structures Constituting Party Walls 427
(C) Creation and Existence 428
(1) By Agreement 428
(2) By Prescription 429
(3) Effect of Sale by Owner 430
(4) Statutory Regulation 431
(D) Duration of Party Wall Easement 432
(E) Rights, Duties and Liabilities of Owners.
(1) In Respect to Construction 433
(2) In Respect to Repairs 434
(3) In Respect to Insufficiency 435
(4) In Respect to Use by Non-Building Owner 436
(5) In Respect to Windows and Openings 437
(F) Rights and Liabilities of Successors In Title.
(1) Payment for Use 438
(2) Necessity of Notice 439

TABLE OF CASES

[References are to Sections.]

A

Abbott v. Mills, 3 Vt. 521 383
Abel v. Love, 81 Ind. App. 328 335, 336, 340
Abeles v. Pillman, 261 Mo. 359 346
Ackerman v. Williamsport, 227 Pa. 591 371
Adams v. Harrington, 114 Ind. 66 249
v. Wilson, 137 Ala. 632 211, 218
Adler v. Parr, 34 Misc. 482 424
Agmar v. Solomon, 87 Cal. App. 127 313, 324
Ainsa v. United States, 161 U. S. 208 202
Airy v. Kunkle, 7 Pa. Super. Ct. 112 173
Alabama v. Georgia, 23 How. (64 U. S.) 505 283, 287
Alaska Juneau Gold Min. Co. v. Northern Lbr. Mills Co., 5 Alaska 269 290
Albers v. Acme Paving &c. Co., 196 Mo. App. 265 361, 366
Albert v. Salem, 39 Ore. 466 90, 114
Albertson v. Chicago Veneer Co., 177 Ky. 285 178
Albright v. Bruner, 14 Ill. App. 319 418
Aldrich v. Brownell, 45 R. I. 142 307
v. Howard, 7 R. I. 199 396
Allen v. Evans, 161 Mass. 485 430
v. Hickman, 156 Mo. 49 326
v. McKay, 120 Cal. 382 336
v. Wood, 256 Mass. 343 297
Allott v. Wilmington Light &c. Co., 288 Ill. 541 106
Alsworth v. Richmond Cedar Works, 172 N. Car. 17 342, 351
Altemus v. Long, 4 Pa. St. 254 354
Alton v. Fishback, 181 Ill. 396 367
Amber v. Cain (Iowa), 110 N. W. 1053 325
American Bank-Note Co. v. New York El. R. Co., 129 N. Y. 252 348
Amerman v. Missouri, K. &c. R. Co. (Tex. Civ. App.), 182 S. W. 54 246
Ames v. Hilton, 70 Maine 36 247
Amite Gravel &c. Co. v. Roseland Gravel Co., 148 La. 704 283
Anderson v. Citizens Sav. &c. Co., 185 Cal. 386 235.1, 246
v. Wirth, 131 Mich. 183 218, 220
Andrews v. Meredith, 131 Iowa 716 324
v. Pitts, 126 Md. 328 185
v. Wheeler, 10 Cal. App. 614 186, 200, 215
v. Youmans, 78 Wis. 56 246
Antomarchi v. Russell, 63 Ala. 356 434
Antonakas v. Anderson Chamber of Commerce, 130 S. Car. 215 392
Apalachicola Land &c. Co. v. McRae, 86 Fla. 393 287
Appel v. Childress, 53 Tex. Civ. App. 607 336, 347, 351
Appleby v. New York, 271 U. S. 364 299
Aquino v. Riegelman, 102 Misc. 228 299
Arambula v. Sullivan, 79 Tex. 615 157, 166

[References are to Sections.]

Archibald v. New York Cent. &c. R. Co., 157 N. Y. 574 336
Arkansas v. Tennessee, 246 U. S. 158 295, 298
Armour v. Sound Shore Front Imp. Co., 159 App. Div. 213 207
Arms v. Owatonna, 117 Minn. 20 91, 108
Armstrong v. Pincus, 81 Ore. 156 287
Arnold v. Orange, 73 N. J. Eq. 280 373
Ashby v. Eastern R. Co., 5 Metc. (46 Mass.) 368 297
Ashford v. Ashford, 136 Ala. 631 339
Athens v. Carmen, 169 Pa. 426 260
Atlanta &c. R. Co. v. Atlanta, 156 Ga. 251 379, 392
Attorney General v. Lakeview Land Co., 143 Ala. 291 377
v. Onset Bay Grove Assn., 221 Mass. 342 363
Attwill v. B. &c. Co., 246 Mass. 292 347
Atwell v. Shook, 133 N. Car. 387 340
Atwood v. Wheat (Ky.), 127 S. W. 511 312
Augusta v. Tyner, 197 Ill. 242 369, 375
Austin v. Bailey, 37 Vt. 219 343
v. Baxter, 189 Iowa 138 350
v. Espuela Land &c. Co. (Tex. Civ. App.), 107 S. W. 1138 217

B

Babcock v. Utter, 1 Keyes (40 N. Y.) 397 287
Backman v. Oskaloosa, 130 Iowa 600 374
Backus v. Smith, 5 Ont. A. 341 404
Bacon v. Boston &c. R. Co., 83 Vt. 421 371
Badeaux v. Ryerson, 213 Mich. 642 363
Baeder v. Jennings, 40 Fed. 199 255
Bagley v. Block, 83 Ore. 607 8
Bailey v. Hipple, 95 Kans. 515 123, 263
Bain v. Tye, 160 Ky. 408 6
Baker v. Chester Gas Co., 73 Pa. 116 361
v. DeArmijo, 17 N. Mex. 383 336, 347
v. Johnson, 79 Ind. App. 413 311, 325
Baker City Mut. Irr. Co. v. Baker City, 58 Ore. 306 363
Bakersfield Town Hall Assn. v. Chester, 55 Cal. 98 340
Baldwin v. Shannon, 43 N. J. L. 596 223
Ball v. Nye, 99 Mass. 582 412
Ballard v. Hansen, 33 Nebr. 861 339
Balmat v. Argenta, 123 Ark. 175 381
Baltimore v. Broumel, 86 Md. 153 371
v. Frick, 82 Md. 77 375
v. White, 62 Md. 362 363
v. Yost, 121 Md. 366 363
Baltimore & O. R. Co. v. Gould, 67 Md. 60 243
Banker v. Caldwell, 3 Minn. 94 80
Bank of Escondido v. Thomas, 108 Cal. XVII 429
Banks v. Ogden, 2 Wall. (69 U. S.) 57 230, 238, 375, 378
Barber v. Robinson, 78 Minn. 193 349
v. Shaffer, 76 Ga. 285 351
Barclay v. Howell, 6 Pet. (31 U. S.) 498 160
Bardeaux v. Greene, 22 Mont. 254 424
Bar Due v. Cox, 47 Cal. App. 713 425
Barger v. Barringer, 151 N. Car. 433 424
Barker v. Publishers' Paper Co., 78 N. H. 160 350, 356
v. Southern R. Co., 125 N. Car. 596 2
Barksdale v. Barksdale, 92 Miss. 166 15

[References are to Sections.]

Barnes v. Berendes, 139 Cal. 32 400
v. Masterson, 38 App. Div. (N. Y.) 612 396, 400
v. Spurch, 121 Wash. 338 436
Barney v. Keokuk, 94 U. S. 324 287
Barrett v. Perkins, 113 Minn. 480 223
Barringer v. Davis, 141 Iowa 419 287
Barry v. Edlavitch, 84 Md. 95 429
Bartlett v. Bangor, 67 Maine 460 383
v. La Rochelle, 68 N. H. 211 137
Bartlett Land Co. v. Saunders, 103 U. S. 316 181
Basic City v. Bell, 114 Va. 157 386
Bast v. Mason, 165 Mo. App. 718 130
Batchelder v. Robbins, 93 Maine 579 341
Bateman v. Jackson (Tex. Civ. App.), 45 S. W. 224 348
Bates v. Wright, 201 Ky. 430 354
Batt v. Kelly, 75 App. Div. 321 437
Bauer v. Gottmanhausen, 65 Ill. 499 136
Baun v. Pardee, 139 N. Y. S. 1077 243
Bay City Gas Light Co. v. Industrial Works, 28 Mich. 182 297
Bayle v. Norris (Tex. Civ. App.), 134 S. W. 767. 342
Beach v. Whittlesey, 73 Conn. 530 174
Beale v. Takoma Park, 130 Md. 297 363, 383
Beasley v. Clarke, 102 Ala. 254 336
Beattie v. Garrison, 204 App. Div. 335 121
Bechtel v. Edgewater, 45 Hun 240 285
Beckley v. Bryan, Sneed (2 Ky.) 91 195, 197
Bedford-Nugent Co. v. Herndon, 196 Ky. 477 287
Beidler v. King, 209 Ill. 302 412
Beitz v. Buendiger, 144 Minn. 52 339
Belding v. Huttenlocher, 177 Iowa 440 338
Belk v. Vance, 165 N. Car. 673 226
Belknap v. Sealey, 14 N. Y. 143 203, 207
Bell v. Burlington, 68 Iowa 296 375
v. Pittsburgh Steel Co., 243 Pa. 83 383
Bell County Land & Coal Co. v. Hendrickson, 24 Ky. L. 371 184
Bellenot v. Laube, 104 Va. 842 426, 434
Belotti v. Biskhardt, 228 N. Y. 296 340
Bender v. Chew, 129 La. 849 201
Benid v. Dorsey, 311 Ill. 192 368
Bennett v. Kovarick, 23 Misc. 73 336
v. Simon, 152 Ind. 490 217
Bennington County v. Manchester, 87 Vt. 555 378
Bensdorff v. Ulhlein, 132 Tenn. (5 Thomp.) 193 336, 338
Benz v. St. Paul, 89 Minn. 31 308, 314, 315
Berg v. Parsons, 156 N. Y. 109 395
Bergen v. Morton Amusement Co., 178 App. Div. 400 403, 407
Betcher v. Chicago, M. &c. R. Co., 110 Minn. 228 234, 366
Bicak v. Runde, 78 Misc. (N. Y.) 358 394
Bigelow v. Herrink, 200 Iowa 830 293
Bingham Livery &c. Co. v. McDonald, 37 Utah 457 341
Birk v. Hodgkins, 159 Cal. 576 112
Birmingham v. Anderson, 48 Pa. Super. Ct. 253 160
v. Graham, 202 Ala. 202 372
v. Louisville &c. R. Co., 297 Fed. 816 362
Bishop v. Readsboro Chain Mfg. Co., 85 Vt. 141 412
Bissell v. Ford, 176 Mich. 64 402, 406
v. New York Cent. R. Co., 23 N. Y. 61 383

[References are to Sections.]

Bitello v. Lipson, 80 Conn. 497 413
Black v. American Int. Corp., 264 Pa. 260 291
Blackburn v. Coffee, 142 Ark. 426 356
Blair v. Hazzard, 158 Cal. 721 339
Blake v. Doherty, 5 Wheat., (18 U. S.) 359 114
v. McCarthy, 115 N. Y. S. 1014 400
Blake Const. Co. v. Boyle, 140 Tenn. 166 432
Blalock v. Atwood, 154 Ky. 394 415
Blanchard v. Savarese, 97 App. Div. (N. Y.) 58 411
Blaney v. Rice, 20 Pick. (39 Mass.) 62 134, 151
Bloch v. Pfaff, 101 Mass. 535 218, 224
Bloom v. Koch, 63 N. J. Eq. 10 413, 424
Bloomingdale v. Duffy, 71 Misc. (N. Y.) 136 411
Boardman v. Scott, 102 Ga. 404 286
Board of Education v. Edson, 18 Ohio St. 221 361, 365
v. Kansas City, 62 Kans. 374 391
Boatman's Bank v. Semple Place Realty Co., 202 Mo. App. 57 372
Boe v. Arnold, 54 Ore. 52 339
Bohrer v. Dienhart Harness Co., 19 Ind. App. 489 411, 412
Bolden v. Sherman, 110 Ill. 418 89
Bolton v. Eggleston, 61 Iowa 163 314, 316
Boltz v. Colsch, 134 Iowa 480 324
Bonaparte v. Wiseman, 89 Md. 12 409, 411
Bone v. May (Iowa), 225 N. Y. 367 295, 298
Bonney v. Greenwood, 96 Maine 335 432
Booth v. Clark, 59 Wash. 229 154, 215
v. Rome W. &c. R. Co., 140 N. Y. 267 394, 397
Booth v. Shepherd, 8 Ohio St. 243 287
Boston v. Lecraw, 17 How. (58 U. S.) 426 285
v. Richardson, 13 Allen (95 Mass.) 146 230, 287
Boston &c. R. Co. v. Reardon, 226 Mass. 286 347
Bourn v. Robinson, 49 Tex. Civ. App. 157 16
Bowersox v. Johnson County, 183 Iowa 645 370
Bowhay v. Richards, 81 Nebr. 764 432
Bowie v. Western Md. R. Term. Co., 133 Md. 1 287
Boyd v. Graves, 4 Wheat. (17 U. S.) 514 327
v. State, 28 Tex. App. 524 423
Bradbury v. Dumond, 80 Ark. 82 349
Brader v. Carthage (Mo.), 256 S. W. 548 258
Bradford v. Cressey, 45 Maine 9 287
Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 60 Ohio St. 560 397
Bradley v. Burkhart, 139 Iowa 323 323
v. Crane, 201 N. Y. 14 377
v. Spokane &c. R. Co., 79 Wash. 455 366
Bradshaw v. Booth, 129 Va. 19 324
Brady v. Baltimore, 130 Md. 506 291
Bragaw St., In re, 141 N. Y. S. 987. 373
Brainin v. New York, N. H. &c. R. Co., 136 App. Div. 393 13, 164
Brannock v. Elmore, 114 Mo. 55 395
Brashears v. Joseph, 32 Ky. L. 1139 189, 193, 195
Brastrom v. Lauppe, 179 Mass. 315 425
Brause v. Fayette County, 164 Iowa 606 135, 253
Breese v. Wagner, 187 Wis. 109 286
Breneiser v. Davis, 134 Pa. 1 141

[References are to Sections.]

Breon v. Robrecht, 118 Cal. 469 341
Brewer v. Boston &c. W. R. Corp., 5 Met. (46 Mass.) 478 318
v. War Fork Land Co., 172 Ky. 598 349, 351
Brewer-Elliott Oil Co. v. United States, 260 U. S. 77 282
Brickell v. Fort Lauderdale, 75 Fla. 622 379, 392
v Trammell, 77 Fla. 544 299
Briers v. Alderson, 101 W. Va. 662 361
Brigantine v. Holland Trust Co. (N. J.) 35 Atl. 344 392
Bright v. Bacon, 131 Ky. 848 429
v. Morgan, 218 Pa. 178 429
v. Superior, 163 Wis. 1 367
Bringhurst v. O'Donnell, 14 Del. Ch. 225 413
Broadway, In re, 137 App. Div. 652 292
Brolaskey v. McClain, 61 Pa. 146 179
Brookfield v. Block, 123 Ark. 153 383
Brooklyn, Q. C. &c. R. Co. v. Bird, 76 Misc. 62 336
Brooks v. Rosenbaum, 217 Mass. 172 433
v. Slaughter (Tex. Civ. App.), 232 S. W. 856 212
Brose v. Boise City R. & Term. Co., 5 Idaho 694 16
Brower v. Wakeman, 88 Conn. 8 285
Brown v. Caldwell, 10 Serg & R. (Pa.) 114 307, 312
v. Chadbourne, 31 Maine 9 287
v. Doherty, 93 App. Div. 190 336
v. East Point, 148 Ga. 85 388, 389, 390
v. Greenfield Congregational Soc., 197 Fed. 238 413
v. Hartford, 173 Mo. 183 340
v. Manning, 6 Ohio St. 298 392
v. Oregon Short Line R. Co., 36 Utah 257 272
v. Ray, 314 Ill. 570 196, 203
Brown Oil Co. v. Cladwell, 35 W. Va. 95 287
Brundage v. Knox, 279 Ill. 450 296
Brunett v. Rochester, 124 Misc. 209 348
Brunner Fire Co. v. Payne, 54 Tex. Civ. App. 501 375
Bryan v. Beckley, Litt. Sel. Cas. (16 Ky.) 91 198
Bryant v. Maine Cent. R. Co., 79 Maine 312 101
v. Terry, 189 Ky. 489 210
Buch v. Hardy, 6 Greenl. (6 Maine) 162 182
Buckingham v. Elliott, 62 Mass. 296 414
Buffalo, In re, 206 N. Y. 319 295
Buffalo, L. &c. R. Co. v. Hoyer, 214 N. Y. 236 376
Buffalo, N. Y. &c. R. Co. v. Stigeler, 61 N. Y. 348 120, 171
Buffalo Pipe Line v. New York L. E. &c. R. Co., 10 Abb. (N. Cas., N. Y.) 107 287
Builders v. Eisman, 88 Ore. 611 110
Bull v. Burton, 227 N. Y. 101 432
v. Willard, 9 Barb. 641 207
Bullard v. Kempff, 119 Cal. 9 111
Burk v. Santa Cruz, 163 Cal. 807 377
Burke v. McCowen, 115 Cal. 481 82
v. Smith, 69 Mich. 380 424
Burleson v. Hamilton, 213 Ala. 198 361
Burlington Gaslight Co. v. Burlington C. R. &c. R. Co., 91 Iowa 470 379
Burnet v. Bagg, 67 Barb. (N. Y.) 154 392
Burns v. New York, 178 App. Div. 615 290
Burr v. Hamer, 12 Nebr. 483 419
Burr's Ferry B. &c. R. Co. v. Allen (Tex. Civ. App.), 164 S. W. 878 283
Burroughs v. Cherokee, 134 Iowa 429 373
Buschmann v. St. Louis, 121 Mo. 523 383
Bush v. Mackett. 95 Nebr. 552 424

[References are to Sections.]

Bushnell v. Scott, 21 Wis. 451 360
Busbee v. Thomas, 175 Ala. 423 132, 153
Butler v. Frontier Tel. Co., 186 N. Y. 485 399

C

Cabot v. Kingman, 166 Mass. 403 390, 401
Cain v. Higland Co., 134 Minn. 430 339, 346
Cake v. Sunbury, 43 Pa. Sup. Ct. 95 375
California Nav. &c. Co. v. Union Transp. Co., 126 Cal. 433 389
Calkins v. Hart, 64 Misc. 149 283
v. Westervelt, 214 Fed. 415 392
Call v. Dancy, 144 N. Car. 494 345
Callen v. Columbus Edison Elec. Light Co., 66 Ohio St. 166 366
Camden v. McAndrews & Forbes Co., 85 N. J. L. 260 375
v. West Branch L. Co., 59 W. Va. 148 336
Cameron v. United States, 148 U. S. 301 344
Camp v. State, 49 Tex. Cr. 396 423
Campbell v. Branch, 49 N. Car. 313 169
v. Kansas City, 102 Mo. 326 389
v. Mesier, 4 Johns. Ch. (N. Y.) 334 434
v. Seattle, 59 Wash. 612 145
C. & O. R. Co. v. Dayton, 197 S. W. 969 249
Cannon v. Emmans, 44 Minn. 294 162
v. Prude, 181 Ala. 629 340
Canton Co. v. Baltimore, 104 Md. 582 377
Card v. Dale, 67 Iowa 552 420
Carpenter v. Coles, 75 Minn. 9 345
v. Reliance Realty Co., 103 Mo. App. 480 410
Carson v. Burnett, 1 Dev. & Bat. 153 101.1, 102
v. Ray, 7 Jones L. (52 N. Car.) 609 3
Carstensen v. Brown, 26 Wyo. 356 319, 325
Carter v. Chesapeake &c. R. Co., 26 W. Va. 644 287, 288
v. Collins (Tex. Civ. App.), 192 S. W. 316 114, 131
v. Elk Coal Co., 173 Ky. 378 161
Carver v. Fennimore, 116 Ind. 236 426
v. San Pedro L. A. &c. R. Co., 151 Fed. 334 287
Carville v. Hutchins, 73 Maine 227 98
Casey v. Chicago, 263 Ill. 147 385
Casselberry v. Ames, 13 Mo. App. 575 406
Cassidy v. Lenahan, 294 Ill. 503 356
Caston v. Rock Hill, 107 S. Car. 124 371
Cates v. Wadlington, 1 McCord (S. Car.) 580 287
Caulfield v. Berwick, 27 Cal. App. 493 390
Cavanaugh v. Johnson, 91 Cal. 580 310
Center v. Collier, 26 Colo. App. 354 383
Central Pac. R. Co. v. Mead, 63 Cal. 112 342
Central R. R. v. Jersey City, 209 U. S. 473 287
Chafee v. Aiken, 57 S. Car. 507 373
Champlain & St. L. R. Co. v. Valentine, 19 Barb. (N. Y.) 484 286
Chancler v. Pope, 205 Ala. 49 339
Chapman v. Kimball, 9 Conn. 38 287
v. Sault Ste. Marie, 146 Mich. 43 371
Chase v. Lavelle, 105 Nebr. 796 339
Chattahoochie &c. R. Co. v. Pilcher, 163 Ala. 401 69, 70
Chavez v. Torlina, 15 N. Mex. 53 341
Cheeney v. Nebraska C. Stone Co., 41 Fed. 740 318
Cherry v. Brizzolara, 89 Ark. 309 430
v. Slade, 7 N. Car. 82 101

[References are to Sections.]

Cheseboro v. Lockwood, 88 Conn. 219 419
Cheshire v. McCoy, 205 Iowa 474 315, 327
Chicago v. Middlebrooke, 143 Ill. 603 336, 347
Chicago &c. R. Co. v. Chicago, 264 Ill. 24 375, 381
v. Hoag, 90 Ill. 339 396, 412
v. Willard, 245 Ill. 391 245
Child v. Starr, 4 Hill (N. Y.) 269 287
v. Starr, 5 Denio (N. Y.) 599 287
Childs v. Dahlke, 151 Wis. 82 238
Chisholm v. Thompson, 233 Pa. 181 115
Chostner v. Shrock (Mo.), 252 S. W. 381 220
Christ Church v. Lavezzelo, 156 Mass. 89 413, 424
Christensen v. Mann, 187 Wis. 567 427
Christopherson v. Forest City, 178 Iowa 893 369
Church v. Meeker, 34 Conn. 421 283, 285
v. Portland, 18 Ore. 73 389
v. Steele, 42 Conn. 69 134, 143
Churchill v. Onderdonk, 59 N. Y. 134 336
Cincinnati v. McMakin, 8 Ohio Dec. 691 363
v. White, 6 Pet. (31 U. S.) 431 362
Cincinnati &c. R. Co. v. Roseville, 76 Ohio St. 108 377
Cissna v. Tennessee, 246 U. S. 289 295
Clark v. Baird, 9 N. Y. 183 128
v. Huntington, 74 Ind. App. 437 362
v. Jackson, 222 Ill. 13 340
v. New York, 165 App. Div. 873. 285
v. Providence, 10 R. I. 437 246
v. State, 50 Ark. 570 423
Clarke v. Evansville Boat Club, 44 Ind. App. 426 386
Clayton v. Feig, 179 Ill. 534 217, 336
Cleaveland v. Flagg, 4 Cush. (58 Mass.), 76 151, 174
v. Smith, 5 Fed. Cas. No. 2874 67
Clement v. Bank of Rutland, 61 Vt. 298 175
v. Burns, 43 N. H. 609 285
v. Paris (Tex. Civ. App.), 154 S. W. 1624 389
Clendenin v. Maryland Const. Co., 86 Md. 80 383
Cleveland v. Choate, 77 Cal. 73 14
Cleveland Cliffs Iron Co. v. Gauthier, 143 Mich. 296 313
Clithero v. Fenner, 122 Wis. 356 342, 349
Clymer v. Roberts, 220 Pa. 162 246
Coal Creek Consol. Coal Co. v. East Tenn. Iron &c. Co., 105 Tenn. 563 356
Cobb v. Davenport, 32 N. J. L. 369 286
Coburn v. San Mateo County, 75 Fed. 520 283, 363
Cochran v. Smith, 73 Hun 597 270
Cockrell v. Dallas (Tex. Civ. App.) 111 S. W. 977 377
Codman v. Crocker, 203 Mass. 146 390
Coe College v. Cedar Rapids, 120 Iowa 541 364
Coffin v. Portland, 27 Fed. 412 379
Cohasset v. Moors, 204 Mass. 173 343
Cohen v. Simmons, 66 Hun (N. Y.) 634 411
Cohoes v. Delaware &c. Canal Co., 134 N. Y. 397 376
Cole v. Haynes, 22 Vt. 588 243
v. Minnesota Loan &c. Co., 17 N. Dak. 409 365
v. Philadelphia, 199 Pa. 464 246
Coles v. Yorks, 36 Minn. 388 155, 162
Collins v. Bluff City Lbr. Co., 86 Ark. 202 339
v. Clough, 222 Pa. 472 212
v. Colleran, 86 Minn. 199 339
v. Megason (Tex. Civ. App.) 228 S. W. 583 342
Colorado County v. Travis County (Tex. Civ. App.) 176 S. W. 845 317
Colter v. Mann, 18 Minn. 79 225
Colton v. Onderdonk, 69 Cal. 155. 397

[References are to Sections.]

Columbia City Land Co. v. Ruhl, 70 Ore. 246 16, 66
Colyer v. Mann, 18 Minn. 79 157
Combs v. Adams, 182 Ky. 762 354
v. Valentine, 144 Ky. 184 50, 193, 195, 197
v. Virginia Iron, Coal & Coke Co., 32 Ky. L. 601 192, 194, 196, 198
Commell v. Clifford, 39 Colo. 121 324
Commercial Nat. Bank v. Eccles, 43 Utah 91 432
Commissioners v. Burgess, 201 Pa. 154 390
Commodores Point Term Co. v. Hudnall, 3 Fed. (2d) 841 291
Commonwealth v. Alger, 7 Cush. (61 Mass.) 53 283
v. Blaisdell, 107 Mass. 234 414
v. Kelly, 8 Grat. (Va.) 632 371
v. Royce, 152 Pa. 88 375
Conboy v. Dickinson, 92 Cal. 600 409
Conkling Min. Co. v. Silver King Coalition Mines Co., 230 Fed. 553 117
Connelly v. Fish, 152 N. Y. S. 371 430, 432
Conner v. Joy (Tex. Civ. App.) 150 S. W. 485 436
Connor v. Johnson, 59 S. Car. 115 73, 139
Cook v. Hensler, 57 Wash. 392 14, 161
v. Paul, 4 Nebr. (Unoff.) 93 438
v. Rounds, 60 Mich. 310 336
Cooley v. Golden, 117 Mo. 33 294
Coombs v. Haley Coal Co., 276 Fed. 342 339
Coop v. George A. Lowe Co. (Utah), 263 Pac. 485 217, 219
Cooper v. Altoona Concrete Const. &c. Co., 231 Pa. 557 409, 410
Cooperative Bldg. Bank v. Hawkins, 30 R. I. 171 66, 67
Coppin v. Manson, 144 Ky. 634 215, 217, 239
Coquille Mill &c. Co. v. Johnson, 52 Ore. 547 339
Cordill v. Israel, 130 La. 138 436
Corey v. Ft. Dodge, 118 Iowa 742 324
Corn v. McCrary, 48 N. Car. 496 168
Cornell v. Bicley, 85 Iowa 219 433
Corrington v. Pierce, 28 Ill. App. 211 312
Corsicana v. Anderson, 33 Tex. Civ. App. 596 373
Cosgrave v. Donovan, 52 Cal. App. 625 312
Costello v. Edson, 44 Minn. 135 336
Costigan v. Pennsylvania R. Co., 54 N. J. L. 233 396
Cottrell v. Pickering, 32 Utah 62 315, 316
Counselman v. Wisconsin Lime &c. Co., 299 Ill. 84 273, 361
County of St. Clair v. Lovingston, 23 Wall. (90 U. S.) 46, 68 292, 298
Cox v. Arnold, 129 Mo. 337 295
v. Couch, 8 Pa. 147 173
v. Freedley, 33 Pa. 124 94, 104, 126, 130, 230
Craig v. Kansas City Term. R. Co., 271 Mo. 516 408, 409, 410
Crandall v. Mary, 67 Ore. 18 114
Crawford v. Maxwell, 3 Humph. (22 Tenn.) 476 422
Creech v. Creech, 186 Ky. 149 339
Crispen v. Hannavan, 50 Mo. 536 340
Crocker v. Cotting, 166 Mass. 183 247
v. Manhattan Life Ins. Co., 61 App. Div. 226 400
Crook County v. Sheridan County, 17 Wyo. 424 320
Crosby v. Greenville, 183 Mich. 452 362, 375
Cross v. Seaboard Air Line R. Co., 172 N. Car. 119 348
Crowder v. Doe, 162 Ala. 151 345
Crowell v. Jones, 167 N. Car. 386 94
Curran v. St. Joseph, 264 Mo. 656 373
Currie v. Gilchrist, 147 N. Car. 648 354
Curtis v. Francis, 9 Cush. (63 Mass.) 427 297
v. Leasia, 78 Mich. 480 422

[References are to Sections.]

D

Dahlin v. Neslund, 125 Minn. 359 249
Dallas Land & Loan Co. v. Garrett (Tex. Civ. App.) 276 S. W. 471 424
Dallenback v. Burnham, 248 Ill. 468 262
Danes v. State, 219 N. Y. 67 283
Daniel v. Burmingham Dental Mfg. Co., 207 Ala. 659 424
Daniels v. Cheshire R. Co., 20 N. H. 85 287
Darlington v. Lane, 46 App. D. C. 465 114
Daugherty v. Manning (Tex. Civ. App.) 221 S. W. 983 324, 340
Davels v. Collins, 43 Fed. 31 340, 342
Davies v. Epstein, 77 Ark. 221 364
v. Wickstrom, 56 Wash. 154 191
Davis v. Bonaparte, 137 Iowa 196 361, 377
v. Commonwealth Land & Lbr. Co., 141 Fed. 711 189, 197, 198
v. Rainsford, 17 Mass. 207 45, 118, 134, 151, 187
v. Union Meeting House Soc., 93 Vt. 520 347
Davock v. Nealon, 58 N. J. L. 21 340
Dayton v. Cooper Hydraulic Co., 10 Ohio Dec. 192 283
Dean v. Lowell, 135 Mass. 55 104, 240
DeBaum v. Moore, 32 App. Div. 397 437
Debhardt v. Reeves. 75 Ill. 301 273
De Carvajal v. Young Men's Christian Assn., 37 Misc. (N. Y.) 727 397
Decker v. Rucker (Tex. Civ. App.) 202 S. W. 1001 318
Deerfield v. Arms, 17 Pick. (34 Mass.) 41 297
Deffenbaugh v. Washington Water Power Co., 24 Idaho 514 364
De Grilleau v. Frawley, 48 La. Ann. 184 373
DeHanne v. Bryant, 61 N. J. Eq. 141 340
Deidrich v. Sommons, 75 Ark. 400 309, 312
DeLancey v. Piepgras, 138 N. Y. 26 285
Deland v. Dixon Power &c. Co., 225 Ill. 212 347
Delaney v. Boston, 2 Har. (Del.) 489 287
Delano v. Air, 157 Ky. 369 341
Delaware & H. Canal Co. v. Hughes, 183 Pa. 66 337
Delaware &c. R. Co. v. Hannon, 37 N. J. L. 276 297
Delaware &c. R. Co. v. Tobyhanna Co., 228 Pa. 487 347
Delaware River, In re, 131 App. Div. 403 283
Delvin v. Powell, 67 Cal. App. 165 351
De Mers v. Rohan, 126 Iowa 488 419
Demopolis v. Webb, 87 Ala. 659 378
Dennis v. State, 43 Tex. Cr. 464 423
Denton v. English (Tex. Civ. App.), 157 S. W. 264 312
Denver v. Clements, 3 Colo. 472 377
Denver &c. Co. v. Wilson, 28 Colo. 6 347
Denver &c. R. Co. v. Hannegan, 43 Colo. 122 366
Deppen v. Bogar, 7 Pa. Super. Ct. 434, 445 201
Deputron v. Young, 134 U. S. 241 351
Derham v. Hill, 57 Colo. 345 7, 16, 66
Dernham v. Williams. 37 N. Y. 251 242
Des Moines v. Hall, 24 Iowa 234 378
Detroit v. Beecher, 75 Mich. 454 419
Dewey v. Chicago, 274 Ill. 268 369, 375
Dey v. Prentice, 90 Hun (N. Y.) 27 419
Diamond Match Co. v. Ontonagon, 72 Mich. 334 383

[References are to Sections.]

Dibblée v. Astoria &c. R. Co., 57 Ore. 428 416
Dickinson v. Arkansas City Imp. Co., 77 Ark. 570 235.1, 386, 387
Dickinson v. Bales, 59 Kan. 224 336
Dickson v. Davis County, 201 Iowa 741 249
Diedrich v. Northwestern U. R. Co., 42 Wis. 248 286
Dierksen v. Pahl, 194 Iowa 713 233
Dietrick v. Noel, 42 Ohio St. 18 342
District of Columbia v. Robinson, 180 U. S. 92 235, 251, 377
Doane v. Wilcutt, 5 Gray (71 Mass.) 328 285
Dobbins v. Economic Gas Co., 182 Cal. 616 339
Dodge v. North End Imp. Assn., 189 Mich. 16 390
Doe v. Finnegan, 210 Ala. 314 342
Doe v. Paine, 4 Hawks (11 N. Car.) 64 127
Doe v. Riley, 28 Ala. 164 143, 170, 248
Dolbeer v. Livingston, 100 Cal. 617 318
Dolphin v. Klann, 246 Mo. 477 173
Donnelly v. United States, 228 U. S. 243 287
Donovan v. Union Pac. R. Co., 103 Nebr. 663 375
Dorsey v. Habersack, 84 Md. 117 427
Douglas v. Coonley, 156 N. Y. 521 432
v. Irvine, 126 Pa. 643 341
Douglas County v. Lawrence, 102 Kans. 656 234, 366, 386
Dow v. Dow, 243 Mass. 587 351
Downend v. Kansas City, 156 Mo. 60 368, 371, 373
Dows Real Estate and Trust Co. v. Emerson, 125 Iowa 86 138
Doyle v. Mellen, 15 R. I. 523 203
Drew v. Swift, 46 N. Y. 204 100
Drimmel v. Kansas City, 180 Mo. App. 339 362, 374
Driveway, In re, 46 Misc. 157 296
Drouin v. Boston &c. R. Co., 74 Vt. 343 347
Dubuque v. Maloney, 9 Iowa 450 383
Duel v. Bluembke, 154 Wis. 519 311
Duff v. Moore, 68 Tex. 270 180
Duke Land &c. Co. v. Murphy, 179 N. Car. 133 361
Dulin v. Ohio River R. Co., 73 W. Va. 166 347
Duluth v. St. Paul &c. R. Co., 49 Minn. 201 376
Duluth Lbr. Co. v. St. Louis B. &c. Co., 17 Fed. 419 283
Duncan v. Madara, 106 Pa. 562 200
v. Rodecker, 90 Wis. 1 432
Dundas v. Lankershim School Dist., 155 Cal. 692 312
Dunne v. Rock Island County, 273 Ill. 53 389
Dunnington v. Hudson, 217 Mo. 93 346
Dunscomb v. Randolph, 107 Tenn. 89 428, 433, 438
Dunton v. Parker, 97 Maine 461 285
Du Pont v. Miller, 310 Ill. 140 360, 377
Durante v. Alba, 266 Pa. 444 403
Durbin v. Roanoke Bldg. Co., 107 Va. 753 231, 241
Durham v. S. R. Co., 121 Fed. 894 347
Dwight v. Des Moines, 174 Iowa 178 323, 324
Dyer v. Philadelphia, 276 Pa. 348 392
Dysart v. Leeds, 2 Pa. 488 420

E

Earll v. Chicago, 136 Ill. 277 367
Earnest v. Little River Land &c. Co., 109 Tenn. 427 399
East 168th St., In re, 28 App. Div. (N. Y.) 143 273
Eddy v. Chace, 140 Mass. 471 432
Edenville v. Chicago, M. &c. R. Co., 77 Iowa 69 377
Edison Illuminating Co. v. Misch, 200 Mich. 114 390

[References are to Sections.]

Ehrenreich v. Froment, 73 App. Div. 213 148, 152
Eldora v. Edgington, 130 Iowa 151 90, 254
Elkins v. Donohoe, 74 W. Va. 335 383
Ellensburg Lodge v. Collins, 68 Wash. 94 438
Ellinwood v. Stancliff, 42 Fed. 316 197
Elliot v. McIntosh, 41 Cal. App. 763 369
Elliott v. Cumberland Coal &c. Co. 109 Tenn. 745 351
v. Hensley, 188 Ky. 444 351
v. Jefferson, 133 N. Car. 207 79
Ellis v. Hazelhurst, 138 Ga. 181 372
Emerson v. Taylor, 9 Greenl. (9 Maine) 42 297
Emery v. Fowler, 38 Maine 99 153
Empenger v. Fairley, 119 Minn. 186 238, 246
Endicott v. Haviland, 220 Mass. 48 387
Erikson v. Horlyk, 48 S. Dak. 544 295
Evans v. Houston Oil Co. (Tex. Com. App.), 231 S. W. 731 341
v. Pettus, 112 Ark. 572 428
Everett v. Edwards, 149 Mass. 588 426, 434
v. Hydraulic Flume Tunnel Co., 23 Cal. 225 412
Evert v. Turner, 184 Iowa 1253 325
Ewart v. Squire, 239 Fed. 34 189
Eyre v. Farbault, 121 Minn. 233 336

F

F. A. Hihn Co. v. Santa Cruz, 170 Cal. 436 377
Fallarn v. Schilling, 29 Kans. 292 424
Falls Village Water Power Co. v. Tibbetts, 31 Conn. 165 256
Farnandis v. Great Northern R. Co., 41 Wash. 486 401, 402, 405, 407
Farr v. Woolfolk, 118 Ga. 277 311, 312
Farris v. Bentley, 141 Wis. 671 287
Farwell v. Chicago, 247 Ill. 235 234, 367
Faure v. Martin, 7 N. Y. 210 207
Fereday v. Mankedick, 172 Pa. 535 361
Fessler v. Union, 67 N. J. Eq. 14 389, 391
Fidelity Realty Co. v. Flahaven Land Co., 193 Ky. 355 101, 174
Field v. Columbet, Fed. Cas. No. 4764 201
Fincannon v. Sudderth, 140 N. Car. 246 102, 169, 177
Finch v. Theiss, 267 Ill. 65 437
Findlay v. State (Tex. Civ. App.), 238 S. W. 956 172
Finley v. Bradley (Tex. Civ. App.), 21 S. W. 609 418
Fiorella v. Jones (Mo.), 259 S. W. 782 339
First Constr. Co. v. State, 221 N. Y. 295 291
First M. E. Church v. Barr, 123 Wash. 425 432
Fisher v. Green, 1 Phila. (Pa.) 382 401
Fitzpatrick v. Penfield, 267 Pa. 564 412
Fitzsimons &c. Co. v. Braun, 199 Ill. 390 397
Flack v. Green Island, 122 N. Y. 107 362, 364
Flaherty v. Moran, 81 Mich. 52 424
Flanagan Bros. Mfg. Co. v. Levine, 142 Mo. App. 242 409, 410
Fleming v. Cohen, 186 Mass. 323 435
v. Moore, 122 Ala. 399 345
Fletcher v. Fuller, 120 U. S. 534 336
v. Phelps, 28 Vt. 257 286
Floeting v. Horowitz, 120 App. Div. 492 207
Florida East Coast R. Co. v. Worley, 49 Fla. 297 364

[References are to Sections.]

Floyd County v. Allen, 190 Ky. 532 283, 290
Flynn v. Beaverhead County, 54 Mont. 309 378
v. Glenny, 51 Mich. 580 135
Foley v. McCarthy, 157 Mass. 474 240
Folkman v. Meyers, 93 N. J. Eq. 208 267
Forgeus v. Santa Cruz County, 24 Cal. App. 193 283
Forney v. Calhoun County, 86 Ala. 463 376
Fortner v. Eldorado Springs Resort Co., 76 Colo. 106 369
Foster v. Zampieri, 140 App. Div. (N. Y.) 471 411
Fourth Avenue, In re, 11 Abb. Prac. (N. Y.) 189 265
Fowler v. Koebler, 43 App. D. C. 349 428
v. Linquist, 138 Ind. 566 377, 379
v. Wood, 73 Kan. 511 284
Fraser v. Ott, 95 Cal. 661 271
Frazee Milling Co. v. State, 122 Misc. 545 299
Freeland v. Pennsylvania R. Co., 197 Pa. 529 293
Freeman, In re, 189 N. Car. 490 310
Freseman v. Purvis, 51 Pa. Super. 506 406
Frimstone v. Spaeter, 150 Pa. 616 230
Froelicher v. Oswald Ironworks, 111 La. 705 396
Frost v. Jacobs, 204 Mass. 1 247
Fuelling v. Fuesse, 43 Ind. App. 441 312
Fuller v. Bilz, 161 Mich. 589 238
v. Shedd, 161 Ill. 462 287
Fulton L., H. &c. Co. v. State, 200 N. Y. 400 283
Fulwood v. Graham, 1 Rich. L. (S. Car.) 491 134
Funk v. Haldeman, 53 Pa. (3 P. F. Smith) 229 426
Futterer v. Sacramento, 196 Cal. 248 379

G

Gadarl v. Humboldt, 87 Kans. 41 374
Gaddes v. Pawtucket Inst. for Sav., 33 R. I. 177 8, 314
Galesville v. Parker, 107 Wis. 363 183
Gallagher v. Dodge, 48 Conn. 387 425
Galveston H. &c. R. Co. v. Eagle Pass (Tex. Civ. App.), 249 S. W. 268 347
Garmire v. Willy, 36 Nebr. 340 439
Garrett v. Sewell, 95 Ala. 456 420, 421
Garvey v. Harbison-Walker Refractories, 213 Pa. 177 363
Gaskin v. Williams, 235 Mo. 563 386
Gates v. Fulkerson, 129 Mo. App. 620 406
Gayetty v. Bethune, 14 Mass. 49 429
Geneva v. Henson, 140 App. Div. 49 283
George v. Tallman, 5 Lans. (N. Y.) 392 207
Georgetown v. Hambrick, 127 Ky. 333 377
Georgia Minerals Co. v. Cox, 154 Ga. 861 351
Georgia R. &c. Co. v. Atlanta, 118 Ga. 486 369
Gerald v. Freeman, 68 Tex. 201 180
Gerhardt v. Sparkling, 49 Hun (N. Y.) 1 207
German Mut. Ins. Co. v. Grim, 32 Ind. 249 8
Gerrish v. Union Wharf, 26 Maine 384 283
G. F. Stearns Land &c. Co. v. Asher, 295 Fed. 268 351
Gibson v. Black, 10 Ky. L. 373 389
v. Denton, 4 App. Div. (N. Y.) 198 412
v. Kelly, 15 Mont. 417 287
Giddings v. State, 50 Tex. Cr. 333 423
Gifford v. Horton, 54 Wash. 595 238

[References are to Sections.]

Gilbert v. Eldridge, 47 Minn. 210 295
v. Evans & Howard F. B. Co., 214 Mo. App. 207 397
v. Woodruff, 40 Iowa 320 433
Gildersleeve v. Hammond, 109 Mich. 431 411
Giller v. West, 162 Ind. 17 417, 424
Gilreath v. State, 96 Ga. 303 422
Girard v. Lehigh Stone Co., 280 Ill. 479 362
v. Philadelphia, 2 Wall. Jr. (U. S.) 301 336
Glenn v. Baltimore, 67 Md. 390 363
Glover v. Pfeuffer (Tex. Civ. App.), 163 S. W. 984 341
v. Shields, 32 Barb. (N. Y.) 374 267
Glyod v. Franck, 248 Mo. 468 220
Goff v. Goff, 78 W. Va. 423 326
v. Rehoboth, 12 Metc. (53 Mass.) 26 8
Goldbacker v. Eggers, 38 Misc. (N. Y.) 36 400
Goldsmith v. Fillman, 33 Pa. Super. Ct. 44 136, 223, 268
Golterman v. Schiermeyer, 125 Mo. 291 322
Gonney v. Greenwood, 96 Maine 335 432
Goodridge v. Dustin, 5 Metc. (46 Mass.) 363 326
v. Mortimer, 44 Cal. App. 576 342
Goozee v. Grant, 81 Nebr. 697 319
Gordon v. Booker, 97 Cal. 586 182
Gore v. Blanchard, 96 Vt. 234 360
Gorton v. Rice, 153 Mo. 676 297
Gosstol Realty Corp. v. Gillman, 224 App. Div. 63 242
Gould v. Howe, 131 Ill. 490 367
v. Wagner, 196 Mass. 270 247
Gourdin v. Davis, 2 Rich. L. (S. Car.) 481 181
Grady v. Greenville, 129 S. Car. 89 347, 364
Graham v. Stern, 168 N. Y. 517 235.2, 239
Granada v. D'Allesandro, 96 Misc. 468 321
Grandona v. Lovdal, 70 Cal. 161 414
Grandville v. Jenison, 84 Mich. 54 366
Grant v. Dickson City Borough, 235 Pa. 536 372
Graves v. Brinkerhoff, 4 Hun (N. Y.) 305 207
Gray v. Kelley, 194 Mass. 533 239, 247
v. Tobin, 259 Mass. 113 401
Graybeal v. Powers, 76 N. Car. 66 168
Grayheart v. Cornett, 19 Ky. L. 1052 307
Greathouse v. Linger, 98 W. Va. 220 350
Green v. Canaan, 29 Conn. 157 371
v. Curran, 77 Colo. 77 383
v. General Petroleum Corp., 205 Cal. 328 397
v. General Petroleum Corp. (Cal.), 270 Pac. 952 397
v. Horn, 207 N. Y. 489 99
v. Palmer, 68 Cal. App. 393 161
v. Pennington, 105 Va. 801 189
Greene v. Boaz, 157 Ala. 68 361
Gregory v. Ann Arbor, 127 Mich. 454 374
Grief v. Kahn, 87 Ky. 17 419, 420
Griffin v. Richardson, 83 W. Va. 442 383
Griffith v. Carrothers, 86 Kans. 93 419
Grim v. Johns, 61 Ind. App. 514 356
Griswold v. Comer (Tex. Civ. App.), 161 S. W. 423 350
Groff v. Philadelphia, 150 Pa. 594 272
Guest v. Reynold, 68 Ill. 478 424
Guilliams v. Beaver Lake Club, 90 Ore. 13 290
Guitar v. St. Clair, 238 Mo. 617 93, 176
Gullett v. Phillip, 153 Ind. 227 327

H

Haas v. Brannon, 99 Okla. 94 413, 430
Haberman v. Baker, 128 N. Y. 253 237

[References are to Sections.]

H. A. Hillmer Co. v. Behr, 264 Ill. 568 377, 381
Haitsch v. Duffy, 10 Del. Ch. 280 399
Hale v. Akers, 69 Cal. 160 211
Haley v. Martin, 85 Miss. 698 158
Hall v. Breyfogle, 162 Ind. 494 363, 383
v. Connecticut Mut. Life. Ins. Co., 76 Minn. 401 238
v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615 389
v. Pratt, 142 Ky. 561 318
v. Tanner, 4 Pa. 244 183
Halpine v. Barr, 10 Mackey (21 D. C.) 331 438
Hamilton v. Blackburn, 43 (Tex. Civ. App.) 153 97, 184
v. Chicago, B. & Q. R. Co., 124 Ill. 235 246
Hamilton County v. Rape, 101 Tenn. 222 366
Hamlin v. Norwich, 40 Conn. 13 262
Hammond v. Maher, 30 Ind. App. 286 371
Hanks v. Houston Oil Co. (Tex. Civ. App.) 173 S. W. 635 340
Hanna v. Palmer, 194 Ill. 41 350
Hannicker v. Lepper, 20 S. Dak. 371 409
Hanrahan v. Baltimore, 114 Md. 517 402, 408
Hansen v. Green, 275 Ill. 221 363
Hanson v. Beaulieu, 145 Minn. 119 439
v. Proffer, 23 Idaho 705 364, 383
v. Red Rock, 4 S. Dak. 358 151
v. Thornton, 91 Ore. 585 292
Haran v. Byrnes, 72 N. H. 93 425
Hardin v. Ferguson, 271 Mo. 410 360, 365
v. Shedd, 190 U. S. 508 281, 282, 286
Harford Trust Co. v. West Hartford, 84 Conn. 646 248
Hargis v. Lawrence, 135 Ark. 321 336
Harlan v. Parsons, 202 Ky. 358 371
Harndon v. Stultz, 124 Iowa 440 415
Harper v. Holston, 119 Wash. 436 287
Harrington v. Boehmer, 134 Cal. 196 158
v. Iowa Cent. R. Co., 126 Iowa 388 273
v. McCarthy, 169 Mass. 492 400
v. Manchester, 76 N. H. 347 374, 383
Harris v. Carter, 189 N. Car. 295 383
v. Elliott, 10 Pet. (35 U. S.) 25 272
v. Lewis, 156 Iowa 413 75, 257, 315
v. McDonald, 152 Ga. 18 339
v. South Portland, 118 Maine 356 369, 371
Harrison v. Augusta Factory, 73 Ga. 447 246
v. Dolan 172 Mass. 395 340
v. Page, 16 Mo. 182 8
Hart v. Independence, 84 Ore. 194 254
Hartford v. Brady, 114 Mass. 466 419
Haslett v. New Albany, Belt & Term. R. Co., 7 Ind. App. 603 238
Hast v. Piedmont &c., R. Co., 52 W. Va. 396 363, 371
Hastings v. McDonough, 13 App. Div. 625 255
Hatch Bros. Co. v. Black, 25 Wyo. 416 362, 371
Hathaway v. Milwaukee, 132 Wis. 249 297
Hatton v. St. Louis, 264 Mo. 634 385
Hawkes v. Hoffman, 56 Wash. 120 435, 439
Hawkins Pt. Light v. House, Fed. Cas. 3987 291
Hawley v. Hawley, 187 Ill. 351 345
Hayden v. Hayden, 178 N. Car. 259 162
Hayes v. Kansas City, 294 Mo. 655 367
v. Williamson-Brown Lbr. Co., 180 N. Car. 252 343, 345

[References are to Sections.]

Hays v. Clawson (Tex. Civ. App.), 286 S. W. 857 97, 114
v. Perkins, 109 Mo. 102 361
Hazen v. Perkins, 92 Vt. 414 286
Healey v. Babbitt, 14 R. I. 533 272
v. Spaulding, 104 Maine 122 425
Healy v. Joliet &c. R. Co., 116 U. S. 191 283
Heartt v. Kruger, 56 N. Y. Super. Ct. 382 430, 432
Heaton v. Hodges, 14 Maine 66 97
Heine v. Merrick, 41 La. Ann. 194 433, 435
Heitz v. St. Louis, 110 Mo. 618 383
Heller v. Cohen, 154 N. Y. 299 17
Hellman v. Los Angeles, 125 Cal. 383 258
Helmick v. Davenport, R. I. &c. R. Co., 174 Iowa 558 325
Hemphill v. Moy, 31 Idaho 66 347
Hemsworth v. Cushing, 115 Mich. 92 407
Henderson v. Blackwell, 189 Ky. 746 387
v. Griffin, 5 Pet. (30 U. S.) 151 341
v. Hatterman, 146 Ill. 555 270
Henderson Elevator Co. v. Henderson, 187 Ky. 453 376
Hennigan v. Mathews, 79 Ore. 622 104, 110
Henry v. Diocese of Kentucky, 207 Ky. 846 231
v. Frohlichstein, 149 Ala. 330 345, 351
v. Koch, 80 Ky. 391 403
Henshaw v. Bissell, 18 Wall. (85 U. S.) 255 211
Hensley v. Burt &c. Lbr. Co., 132 Ky. 112 8
Herald v. United States, 284 Fed. 927 287
Hermann v. McIver, 51 Tex. Civ. App. 270 339
v. Thomas (Tex. Civ. App.), 168 S. W. 1037 102, 180
Heron v. Houston, 217 Pa. 1 433
Herse v. Questa, 100 App. Div. 59 322
Hibbard v. Halliday, 58 Okla. 244 424
Hickey v. McCabe, 30 R. I. 346 397
v. Michigan Cent. R. Co., 96 Mich. 498 414
Hickman v. Clarksburg, 81 W. Va. 394 379
Higginbotham v. Stoddard, 72 N. Y. 94 117
v. Stoddard, 9 Hun (N. Y.) 1 153
Higgins v. Kingsley, 82 Hun (N. Y.) 150 420
Higuera v. United States, 5 Wall. (72 U. S.) 827, 835 45, 74, 119
Hill v. Belmar, 3 Misc. (N. J.) 254 389
v. Collier (Tex. Civ. App.), 135 S. W. 1084 315
v. Edie, 49 Hun (N. Y.) 605 336
v. Huron, 33 S. Dak. 324 436, 438
v. Kimball, 269 Ill. 398 273
v. McConnell, 106 Md. 574 176
v. Oxnard, 46 Cal. App. 624 375
v. State, 104 Ala. 64 423
v. Walker (Tex. Civ. App.), 140 S. W. 1159 326
Hills v. Ludwig, 46 Ohio St. 373 308
Hillside Cotton Mills v. Bartley, 156 Cal. 271 218
Hinckley v. Hastings, 2 Pick. (19 Mass.) 162 249
Hines v. Symington, 137 Md. 441 349
Hinkley v. State, 202 App. Div. (N. Y.) 570 290
v. State, 234 N. Y. 309 291
Hirschberg v. Flusser, 91 N. J. L. 66 411
Hoar v. Hennessey, 29 Mont. 253 420
Hobart v. Hall, 174 Fed. 433 238, 289, 295
Hobart-Lee Tie Co. v. Grabner, 206 Mo. App. 96 290
Hoboken v. Pennsylvania R. Co., 124 U. S. 656 291, 375
Hoboken Cemetery v. Griffin, 88 N. J. L. 111 392

[References are to Sections.]

Hodges v. Williams, 95 N. Car. 331 287
Hodgkins v. Farrington, 150 Mass. 19 400
Hoffman v. Armstrong, 48 N. Y. 201 400, 414
v. Dickson, 47 Wash. 431 438
v. Kuhn, 57 Miss. 746 432
v. Port Huron, 102 Mich. 417 94
v. Tuolumne County Water Co., 10 Cal. 413 412
Hoge v. Lee, 184 N. Car. 44 90, 114
Hohl v. Iowa Cent. R. Co., 162 Iowa 66 293
Holden v. Chandler, 61 Vt. 291 286, 288
v. Crolly, 153 App. Div. (N. Y.) 254 112, 173
v. Page, 118 Maine 242 336, 337, 345
Holdsworth v. Gates, 50 Tex. Civ. App. 347 151
Holladay v. Marsh, 3 Wend. (N. Y.) 142 419
Holley v. Curry, 58 W. Va. 70 68
Home Laundry Co. v. Louisville, 168 Ky. 499 376
Hominy Creek Land Co. v. Gauley Coal Land Co., 103 W. Va. 477 351, 354
Hooker v. Morris, 92 Okla. 194 364
Hooten v. Comerford, 152 Mass. 591 211
Hope v. Shiver, 77 Ark. 337 363, 381
Hopkinson v. McKnight, 31 N. J. L. 422 246
Hopkinsville v. Jarrett, 156 Ky. 777 389
Hopper v. Hickman, 169 Mo. 166 326
Horenburger v. Topper, 133 N. Y. S. 358 437
Hornet v. Dumbeck, 39 Ind. App. 482. 15
Horowitz v. Blay, 193 Mich. 493 407
Horton v. Okanogan County, 98 Wash. 626 387
Hoskins v. Byler, 53 Ark. 532 339
v. Morgen, 197 Ky. 736 311
Houston v. Finnegan (Tex. Civ. App.), 85 S. W. 470 370, 371, 383
Houston Oil Co. v. Dowden, 202 Fed. 714 341
v. Kimball, 103 Tex. 94 340
Howard v. Cornett, 151 Ky. 125 16
Howatt v. Humbolt Milling Co., 61 Cal. App. 333 307
Howe v. Bass, 2 Mass. 380 170
Howell v. Garlington (Tex. Civ. App.) 270 S. W. 269 351
Hoxie v. Gibson, 150 Ark. 432 362, 377
Hoyt v. Gleason, 65 Fed. 685 390
Hubbard v. Dusy, 80 Cal. 281 122
Hubbell v. Peck, 15 Conn. 133 420
Huber v. Johnson, 174 Ky. 697 356
Hudson v. Carrithers, 201 Ill. App. 153 378
Hughes v. Anderson, 79 Ala. 209 336, 341
v. Bingham, 135 N. Y. 347 376
Hull v. Breedlove (Ind. App.), 165 N. E. 328 419
Humphrey v. Krutz, 77 Wash. 152 386
Hunnicutt v. Peyton, 102 U. S. 333 351
Hunt v. Ambruster, 17 N. J. Eq. 208 438
v. Guilford, 4 Ohio (4 Ham.) 317 341
Hunter v. Des Moines, 144 Iowa 541 374
v. Malone, 49 Tex. Civ. App. 116 310
Hunter, In re, 47 App. Div. (N. Y.) 102 381
Hunter, In re, 163 N. Y. 542 373
Hunter, In re, 164 N. Y. 365 369
Huntley v. Houghton, 85 Vt. 200 8, 15
Hurby v. Lonseth, 63 Wash. 589 218, 320
Hurley v. Brown, 98 Mass. 545 7
Hutchinson v. Schimmelfelder, 40 Pa. 396 396
v. Wegner, 157 Minn. 41 317
Hutton v. Yolo Orchard Co. (Cal.), 258 Pac. 96 163

[References are to Sections.]

I

Iglehart v. Chicago &c. R. Co., 241 Ill. 268 381
Illinois Cent. R. R. v. Illinois, 146 U. S. 387 299
v. Moore, 160 Ill. 9 336
v. Noyes, 252 Ill. 178 337
Illinois Steel Co. v. Bilot, 109 Wis. 418 286
v. Paczocha, 139 Wis. 23 341
Illinois Tr. &c. Bank v. Chicago, 247 Ill. 264 234
Ilsley v. Kelly, 113 Maine 497 312
Immell v. Seaverns, 117 Kan. 12 339
Indiana v. Kentucky, 136 U. S. 479 287
Indianapolis v. Board of Church Extension, 28 Ind. App. 319 380
Ingals v. Plamondon, 75 Ill. 118 437
Ingell v. Nooney, 2 Pick. (19 Mass.) 362 3
Ingwersen v. Barry, 118 Cal. 342 425
International &c. R. C. v. Morin, 53 Tex. Civ. App. 531 261
Interstate Iron &c. Co. v. East Chicago, 187 Ind. 506 374
Inyo County v. Given, 183 Cal. 415 368, 383
Ipock v. Glaskins, 161 N. Car. 673 350
Irvin v. Crammond, 58 Ind. App. 540 238, 287
Island Heights Hotel &c. Co. v. Freeman, 77 N. J. Eq. 569 392
Iverson v. Swann, 169 Mass. 582 190, 319
Ivey v. Cowart, 124 Ga. 159 312, 325

J

Jackman v. Rosenbaum Co., 260 U. S. 22 431, 433
v. Rosenbaum Co. 263 Pa. 158 431
Jackson v. Boston &c. R. Corp., 1 Cush. (55 Mass.) 575 285
Jackson v. Freer, 17 Johns. (N. Y.) 29 82, 154
v. Miller (Mo.), 195 S. W. 703 77
v. Rutland &c. R. Co., 25 Vt. 150 417
v. Sprague, 13 Fed. Cas. 7148 205
Jackson ex dem. Ellice v. Britlon, 4 Wend. (N. Y.) 507 342
Jacobs v. Goodrich, 90 Nebr. 478 255
Jacobs Pharmacy Co. v. Luckie, 143 Ga. 457 376
Jacob Tome Inst. v. Crothers, 87 Md. 569 341, 343
Jaggers v. Stringer, 47 Tex. Civ. App. 571 183, 186
Jasperson v. Scharnikow, 150 Fed. 571 346
J. B. Streeter, Jr. Co. v. Fredrickson, 11 N. Dak. 300 340
Jeems Bayou Fishing &c. Club v. United States, 260 U. S. 561 287
Jefferis v. East Omaha L. Co., 134 U. S. 178 298
Jenkins v. Trager, 40 Fed. 726 307, 308
Jenny Lind Co. v. Bower, 11 Cal. 194 198
Jerome Ave., In re, 54 Misc. 345 233
Jersey City v. Morris Canal &c. Co., 12 N. J. Eq. 547 375
John A. Stees Co. v. Reinhardt, 142 Minn. 340 262
Johns v. State, 76 Tex. Cr. 303 423
Johnson v. Albuquerque, 12 N. Mex. 20 335
v. Archibald, 78 Tex. 96 184, 185
v. Arnold, 91 Ga. 659 246
v. Grenell, 112 App. Div. (N. Y.) 620 231
v. Ingram, 63 Wash. 554 335
v. Knippa (Tex. Civ. App.), 127 S. W. 905 217
v. Llano County, 15 Tex. Civ. App. 421 347
v. Niagara Falls, 230 N. Y. 77 373

[References are to Sections.]

Johnson v. Perterson, 90 Minn. 503 339
v. Robertson, 156 Iowa 64 235
Johnston v. Hyre, 83 Kans. 38 406
v. Long Island Inv. &c. Co., 85 App. Div. 60 398
Joliff v. Muncie Elec. Light Co., 181 Ind. 650 249
Jones v. Clarksburg, 84 W. Va. 257 347
v. Derosset (Mo. App.), 185 S. W. 239 421
v. Devereux, 90 S. Car. 513 340
v. Hamilton, 137 Ky. 253 84, 85, 102, 169
v. Houston (Tex. Civ. App.), 188 S. W. 688 390
v. Monroe (Tex. Com. App.), 285 S. W. 1055 438
v. Motley, 11 Ky. L. 921 422
v. Rountree, 138 Ga. 757 347
v. Scott, 314 Ill. 118 308
v. Soulard, 24 How. (65 U. S.) 41 293
v. Water Lot Co., 18 Ga. 539 287
v. Williams, 56 Wash. 588 425
Jordan v. Otis, 37 Barb. (N. Y.) 50 372

K

Kalez v. Spokane Valley Land &c. Co., 42 Wash. 43 283
Kanall v. Wright, 137 Wash. 661 347
Kanouse v. Slockbower, 48 N. J. Eq. 42 286
Kansas v. Meriwether, 182 Fed. 457, 463 296
Karasek v. Peier, 22 Wash. 419 425
Kashman v. Parsons, 70 Conn. 295 151
Katzenbach v. Armstrong Cork Co., 99 N. J. Eq. 32 291
Kavanaugh v. Baird, 241 Mich. 240 293
v. Rabior, 222 Mich. 68 286
Kee v. Satterfield, 46 Okla. 660 383
Keefer v. Jamison (Tex. Civ. App.), 199 S. W. 490 131
Kehres v. New York, 162 App. Div. (N. Y.) 349 243
Keller v. Harrison, 139 Iowa 383 323
Kellett v. Clayton &c. Road Co., 99 Cal. 210 432
Kelley v. Jones, 110 Maine 360 369
Kelly v. Hayward, 192 Cal. 242 389
Kelsoe v. Oglethorpe, 120 Ga. 951 386
Kendall-Smith Co. v. Lancaster County, 84 Neb. 654 363
Kendrick v. Burchett, 28 Ky. L. 342 201
Johnson (Tex. Civ. App.), 173 S. W. 914 71, 73
Kennard v. Eyermann, 267 Mo. 1 389
Kennedy v. Cumberland, 65 Md. 514 373, 375
v. Lubold, 88 Pa. 246 201, 206
v. Mineola, H. & Trac. Co., 77 App. Div. 484 206
Kentucky Union Co. v. Hevner, 210 Ky. 121 351
Kenwood Park v. Leonard, 177 Iowa 337 363, 366, 377, 381, 382, 383
Keppler v. Richmond, 124 Va. 592 360
Kerr v. De Laney, 28 Ky. L. 1140 211
Ketchum v. Newman, 116 N. Y. 422 411
Kidder v. Smith, 192 Mo. App. 205 93, 100
Kiernan v. Jersey City, 80 N. J. L. 273 361
Killbeck v. Baughn, 126 Iowa 194 437
Kimball v. Carter, 95 Va. 77 416
v. Chicago, 253 Ill. 105 369, 382
v. Kenosha, 4 Wis. 321 231
v. McKee, 149 Cal. 435 103
Kimbell v. Powell, 57 Tex. Civ. App. 57 8
King v. Brigham, 19 Ore. 560 114
v. Carmichael, 136 Ind. 20 347
v. Lane (Tex. Civ. App.), 186 S. W. 392 13

[References are to Sections.]

King v. North Chesapeake Beach Land &c. Co., 143 Md. 693 293, 392
v. Watkins, 93 Fed. 913 184
Kingman v. Sparrow, 12 Barb. (N. Y.) 201 287
v. Sparrow, 1 N. Y. 242 287
Kings County Fire Ins. Co. v. Stevens, 87 N. Y. 287 243
Kirby v. Boaz, 103 Tex. 525 340
v. Kirby, 236 Ill. 255 346
Kirk v. Smith, 9 Wheat. (22 U. S.) 241 339
Kirkland v. Tampa, 75 Fla. 271 377, 385
Kirkpatrick v. McCracken, 161 N. Car. 198 315
Kirwin v. Mexico Petroleum Co., 267 Fed. 460 290
Klinkert v. Racine, 177 Wis. 200 347
Knapp v. Siegley, 120 Wash. 478 406, 409
Knappenberger v. Fairchild, 210 Pa. 173 428
Knox v. Artman, 3 Rich. L. (S. Car.) 283 419
Kobayashi v. Strangeway, 64 Wash. 36 418
Kobbe v. Harriman Land Co., 139 Tenn. 251 8
Kobielski v. Belle Isle East Side Creamery Co., 222 Mich. 656 396
Koch v. Dunkel, 90 Pa. 264 182
v. Gordon, 231 Mo. 645 93, 171
Koenigs v. Jung, 73 Wis. 178 260
Kohlman v. Glaudi, 52 La. Ann. 700 340
Korn v. Weir, 88 N. Y. S. 976 411
Koyer v. Miner, 172 Cal. 448 290
Krause v. El Paso, 101 Tex. 211 347
Kreischer v. Hampton Co., 163 App. Div. (N. Y.) 925 407
Kronberg v. Bulle, 247 Mass. 325 402, 406
Krueger v. Gulf, C. &c. R. Co. (Tex. Civ. App.), 191 S. W. 151 383
v. Market, 124 Minn. 393 336
v. Ramsey, 188 Iowa 861 273
Kruger v. Constable, 116 Fed. 722 381, 383
v. Le Blane, 70 Mich. 76 377
Kuck v. Wakefield, 58 Ore. 549 366, 377
Kuehl v. Betterdorf, 179 Iowa 1 377
Kuglin v. Bock, 181 Ill. 165 75
Kuh v. O'Reilly, 261 Ill. 437 436

L

La Barre v. Bent, 154 Mich. 520 347
Lacy v. Oskaloosa, 143 Iowa 704 366
Laddonia v. Day, 265 Mo. 383 313, 366
LaHue v. Bungenstock, 297 Mo. 577 312
Lais v. Silverston, 82 Ore. 503 367
Lake City v. Fulkerson, 122 Iowa 569 388
Lake Erie &c. R. Co. v. Whitham, 155 Ill. 514 362, 365
Lake Sand Co. v. State ex rel., 68 Ind. App. 439 299
Lake Shore &c. R. Co. v. Platt, 53 Ohio St. 254 287
Lake View v. Le Bahn, 120 Ill. 92 381
Lambert v. Krum, 121 Misc. 170 207
v. Vare, 88 N. J. Eq. 81 293
Lance v. Rumbough, 150 N. Car. 19 122
Land & Lake Assn. v. Conklin, 182 App. Div. (N. Y.) 546 286
Land Co. v. Saunders, 103 U. S. 316 167
Landon v. Clark, 242 Fed. 30 286
Lane v. Jacobs, 166 App. Div. (N. Y.) 182 321, 323
Lanfear v. Mestier, 18 La. Ann. 497 198
Lang v. Clark, 85 Vt. 222 349
Lansburgh v. District of Columbia, 8 App. D. C. 10 363
Lantis v. Reithmiller, 95 Mich. 45 419
Lard v. Langdon, 91 Maine 221 424, 425

[References are to Sections.]

Laredo v. DeMoreno (Tex. Civ. App.), 183 S. W. 827 347
Larkey v. Los Angeles, 70 Cal. App. 635 234, 347, 383
Larson v. Metropolitan St. R. Co., 110 Mo. 234 401, 409, 411
Lasley v. Kniskern, 152 Mich. 244 337
Laughlin v. Francis, 129 Iowa 62 322, 325
Laurence v. Coombs, 37 N. H. 331 419
Lavery v. Hannigan, 52 N. Y. Super. 463 396
Lawe v. Kaukauna, 70 Wis. 306 363
Lawrenceburg v. Wesler, 10 Ind. App. 153 377
Lawson v. Murden, 60 Misc. (N. Y.) 163 99, 152
Lea v. Jones, 209 Pa. 22 438
Leader Realty Co. v. Lakeview Land Co., 133 La. 646 351
v. Taylor, 147 La. 256 351
Leadville v. Coronado Min. Co., 37 Colo. 234 367
v. Coronado Min. Co., 29 Colo. 17 374
Leaf v. Pennsylvania Co., 268 Pa. 579 287
Leary v. Jersey City, 248 U. S. 328 287
v. Jersey City, 189 Fed. 419 287
Leavenworth Lodge No. 2 v. Byers, 54 Kans. 323 395
Le Compte v. Lueders, 90 Mich. 495 135
Lederer v. Colonial Inv. Co., 130 Iowa 157 426, 431
Lee v. Harris, 206 Ill. 428 375
v. O'Quin, 103 Ga. 355 346
Lehigh &c. R. Co. v. Warwich, 164 App. Div. (N. Y.) 55 361
Lehigh Valley Coal Co. v. Beaver Lbr. Co., 203 Pa. 544 139
Lehman v. Smith, 40 S. Dak. 556 315
Leland v. Bourne, 41 Utah 125 257
LeMay v. Furtado, 182 Mass. 280 246, 247
Lemle v. Louisiana Farm Land Co., 135 La. 757 361
LeMoyne v. Hays, 145 Ky. 415 351
Le Roy v. Collins, 154 Mich. 77 381
Letts v. Kessler, 54 Ohio St. 73 424
Lewellen v. Williams, 14 Wis. 687 96, 98
Lewis v. Barnhart, 145 U. S. 56 344, 345
v. Pleasants, 143 Ill. 271 346
v. Yates, 62 W. Va. 575 184
v. Yates, 72 W. Va. 841 184
Lexington v. Suburban Land Co., 235 Mass. 108 233
Lexington Lodge v. Beall, 94 Miss. 521 432, 435
Lick v. O'Donnell, 3 Cal. 59 3
Lilis v. Urrutia, 9 Cal. App. 557 158
Lincoln v. Edgecomb, 28 Maine 275 217
Lincoln Safe Dep. Co. v. New York, 210 N. Y. 34 233
Lins v. Seefeld, 136 Wis. 610 338
Linthicum v. Shipley, 140 Md. 96 286, 291
Litchfield v. Sewell, 97 Iowa 247 342
v. Sewell, 97 Iowa 346 346
Little v. Laubach, 183 Iowa 1370 419
Littlefield v. Hubbard, 124 Maine 299 377
v. Littlefield, 28 Maine 180 285
Little Rock v. Galloway, 162 Ark. 329 347
Llano v. Llano County, 5 Tex. Civ. App. 132 389
Locklin v. Tucker, 208 Ala. 155 362
Lockwood v. New York &c. R. Co., 37 Conn. 387 291
Logan v. Charles K. Spaulding Logging Co., 100 Ore. 731 283
London & San Francisco Bank, Ltd. v. Oakland, 90 Fed. 691 387
Long Dock Co. v. State Board of Assessors, 89 N. J. L. 108 291

[References are to Sections.]

Longee v. Shuhart, 127 Iowa 173 340
Longworth v. Sedevic, 165 Mo. 221 361
Lorenzi v. Star Market Co., 19 Idaho 674 439
Los Angeles v. Anderson (Cal.), 275 Pac. 789 291
Los Angeles County v. Hannon, 159 Cal. 37 2
Lotz v. Scott, 103 Ind. 155 398
Loud v. Brooks, 241 Mich. 452 246
Louden v. Starr, 171 Iowa 528 374
Louisiana v. Mississippi, 202 U. S. 1 287
Louisville v. Snow, 107 Ky. 536 372, 373
Louisville &c. R. Co. v. Bailey, 33 Ky. L. 179 377
v. Philyaw, 88 Ala. 264 342
Loustalot v. McKeel, 157 Cal. 634 312
Love v. Jones (Tex. Civ. App.), 138 S. W. 1128 176
v. Turner, 78 S. Car. 513 343
Lovejoy v. Gaskill, 30 Minn. 137 66
Lowe v. Guard, 11 Ind. App. 472 419
Lowery v. Pekin, 210 Ill. 575 373
Lowi v. David, 134 Miss. 296 356
Lownsdale v. Portland, 15 Fed. Cas. No. 8, 578 373
Loyal Mystic Legion v. Jones, 73 Nebr. 342 438
Lucas v. Crofoot, 95 Conn. 619 343
Lukens v. Lasher, 202 Pa. 327 428
Lunt v. Holland, 14 Mass. 149 155
Lutterloh v. Cedar Keys, 15 Fla. 306 389
Luttrell v. Whitehead, 121 Ga. 699 350
Lyman v. Gedney, 114 Ill. 388 96, 98
Lynbrook Homes Inc. v. Frey, 217 App. Div. (N. Y.) 164 373
Lynchburg v. Peters (Va.), 133 S. E. 674 273
Lynchburg Traction &c. Co. v. Lynchburg, 142 Va. 255 376

M

McAlleer v. Glover, 146 Ga. 369 325
McAlpine v. Chicago Great Western R. Co., 68 Kans. 207 388, 390
McAndrews & Forbes Co. v. Camden, 78 N. J. Eq. 244 375
McAuliff v. Parker, 10 Wash. 141 340
McAvoy v. Cassidy, 8 Misc. (N. Y.) 595 340
McBride v. Caldwell, 142 Iowa 228 346
McBurney v. Knox, 111 Tex. 510 352
v. Young, 67 Vt. 574 283
McClellan v. Weston, 49 W. Va. 669 253
McClintock v. Rogers, 11 Ill. 279 95, 189
McCloskey v. Pacific Coast Co., 160 Fed. 794 361, 375
Macom v. Brewster, 273 Mo. 616 155
MacCorkle v. Charleston, 105 W. Va. 395 247
McCormick v. Stoneheart (Tex. Civ. App.), 195 S. W. 883 439
McCoy v. Paxton, 156 Iowa 194 297
McCurdy v. Rich, 76 Ind. App. 469 349
McCutcheon v. Terminal Station Comm. 88 Misc. (N. Y.) 601 377
McDaniel v. Greenville-Carolina Power Co., 95 S. Car. 268 287
v. Mace, 47 Iowa 509 82
McDonald v. Kummer, 56 Colo. 153 235.2
v. Whitehurst, 47 Fed. 757 284
McDougal v. Conn (Tex. Civ. App.), 195 S. W. 627 8
v. Southern Pac. R. Co., 162 Cal. 1 2
McElhone, Appeal of, 118 Pa. 600 378
McGinnis v. St. Louis, 157 Mo. 191 363

[References are to Sections.]

McGovern v. Heery, 159 Iowa 507 312
McIntyre v. El Paso, 15 Colo. App. 78 389
McKee v. Pennsylvania R. Co., 255 Pa. 560 373
McKenzie v. Gleason, 184 Mass. 452 247
McKeon v. Roan (Tex. Civ. App.), 106 S. W. 404 308
McKinney v. Doane, 155 Mo. 287 116
v. Northcott, 114 Mo. App. 146 283
McLellan v. McFadden, 114 Maine 242 284
McMahon v. Borland, 262 Ill. 358 366
McNeely v. State, 50 Tex. Cr. 279 423
McNichol v. Flynn, 167 App. Div. (N. Y.) 646 93, 100, 120, 324, 325
McPherson v. Foster, 16 Fed. Cas. 8921 142
McQueen v. Graham, 183 N. Car. 491 354
Maddox v. Fenner, 79 Tex. 279 86, 102, 180
Madison v. Mayers, 97 Wis. 399 258
Mad River Co. v. Pracney, 100 Conn. 466 288
Magoun v. Lapham, 21 Pick. (38 Mass.) 135 155, 164, 171
Mahaffey v. Miller, 159 La. 610 263
Mahoney v. Libbey, 123 Mass. 20 412
Mahoning County v. Young, 59 Fed. 96 386
Main v. Nash, 212 Mo. App. 689 364
Makepeace v. Bancroft, 12 Mass. 469 134, 151
Manchester v. Hodge, 74 N. H. 468 246
Manderschild v. Dubuque, 29 Iowa 73 371
Manhattan Real Estate &c. Assn. v. Cudlipp, 80 App. Div. (N. Y.) 532 426
Manitou v. International Trust Co., 30 Colo. 467 361
Manning v. House, 211 Ala. 570 361, 367, 380, 383
Manufacturers Land &c. Co. v. Board of Commerce & Nav., 98 N. J. L. 638 297
Marine R. & Coal v. United States, 257 U. S. 47 287
Maring v. Meeker, 263 Ill. 136 339
Marion v. Skillman, 127 Ind. 130 363
Marks v. Morgan, 165 Ark. 613 356
Marsh v. Fairbury, 163 Ill. 401 392
v. Marshall, 19 N. H. 301 140
v. Stephenson, 7 Ohio St. 264 217
Marshall v. Springfield (Mo.), 221 S. W. 17 347
Martin v. Busch, 93 Fla. 535 292
v. Hall, 152 Ky. 677 341
v. Frazier, 172 Iowa 63 324
Maryland v. West Virginia, 217 U. S. 577 287
Maryland Const. Co. v. Kuper, 90 Md. 529 16
Maryland Tel. & T. Co. v. Ruth, 106 Md. 644 247
Masterson v. Bockel, 32 Tex. Civ. App. 509 312
Matheny v. Allen, 63 W. Va. 443 84
Mather v. Walsh, 107 Mo. 121 339
Mattheisen & Hegeler Zinc Co. v. La Salle, 117 Ill. 411 378
Matthews v. Thatcher, 33 Tex. Civ. App. 133 175
May v. Atlantic Coast Line R. Co., 151 N. Car. 388 347
v. Wolf Valley Coal Co., 167 Ky. 525 193
Mayberry v. Beck, 71 Kans. 609 205
Mayhew v. Norton, 17 Pick. (34 Mass.) 357 285
Mayor of New York, In re, 182 N. Y. 361 285
Maysville v. Truex, 235 Mo. 619 218
Meachem v. Seattle, 45 Wash. 380 367
Meadock v. Champe, 193 Mich. 553 429

[References are to Sections.]

Meadows v. Michel, 135 App. Div. (N. Y.) 213 147
Mebane v. Wynne, 127 Ark. 364 383
Mechler v. Dehn, 117 Misc. (N. Y.) 591 165, 223
v. Dehn, 203 App. Div. (N. Y.) 128 223, 225
Medara v. Du Bois, 187 Pa. 431 94, 149
Meek v. Davis, 189 Ky. 64 342
Meier v. Portland Cable R. Co., 16 Ore. 500 383
Mechler v. Dehn, 117 Misc. (N. Y.) 591 161
Menominee River Lbr. Co. v. Seidl, 149 Wis. 316 296
Menstell v. Johnson, 125 Ore. 150 383
Mercantile Library Co. v. University of Pennsylvania, 220 Pa. 328 427
Meriwether v. Garrett, 102 U. S. 472 380
Merrill v. Hutchins, 180 Iowa 1276 248
v. Newton, 99 Mich. 225 235.1, 246
Merritt v. Westerman, 180 Mich. 449 337
Meservey v. Gulliford, 14 Idaho 133 398
Metzger v. Hachrein, 107 Wis. 267 424
Meyer v. Comegys, 147 La. 851 72
Meyers v. Oceanside, 7 Cal. App. 87 380, 385
Miami v. Florida East Coast R. Co., 79 Fla. 539 383
Miami County v. Wilgus, 42 Kans. 457 367
Micelli v. Andrus, 61 Ore. 78 283
Michael v. Megan (Iowa), 115 N. W. 483 324
Michigan v. Wisconsin, 270 U. S. 295 351
Michigan Cent. R. Co. v. Hammond W. &c. Elec. R. Co., 42 Ind. App. 66 379
Middletown v. Glenn, 278 Ill. 149 375
Miles Land Co. v. Hudson Coal Co., 246 Pa. 11 94
Miller v. Columbia, 138 S. Car. 343 389
v. Grunsky, 141 Cal. 441 168
v. Mann, 55 Vt. 475 287
v. State, 124 Tenn. 293 283
Millerman v. Megaritty (Tex. Civ. App.), 242 S. W. 757 88
Millner v. Elias, 101 Conn. 280 419
Mills v. Laing, 38 Cal. App. 776 339
v. Trustees of Zion Chapel, 119 Md. 510 348
Milton v. Puffer, 207 Mass. 416 398
Milwaukee Boiler Co. v. Wadhams Oil &c. Co., 126 Wis. 32 263
Miner v. New York, 37 N. Y. Super. Ct. 171 246
Mining Co. v. Taylor, 100 U. S. 37 348
Minneapolis Mill Co. v. Minneapolis & St. L. R. Co., 51 Minn. 304 317
Minnesota v. Wisconsin, 252 U. S. 273 287
Minor v. New Orleans, 115 La. 301 283
Minto v. Salem Water L. &c. Co., 120 Ore. 202 342
Mintzer v. North American Dredging Co., 242 Fed. 553 283
Mission of Immaculate Virgin v. Cronon, 143 N. Y. 524 336
Missouri, K. &c. R. Co. v. Anderson, 36 Tex. Civ. App. 121 90
Missouri Lbr. Co. v. Chronister (Mo.), 259 S. W. 1042 346
Moale v. Baltimore, 5 Md. 314 378
Mobile &c. R. Co. v. Strain, 125 Miss. 697 347
Moenig v. New York Cent. R. Co., 187 App. Div. (N. Y.) 323 289
Mollenhauer v. Wolfe, 118 Misc. (N. Y.) 390 427, 429, 437
Monroe Mill Co. v. Menzel, 35 Wash. 487 283
Montana Min. Co. v. St. Louis Min. &c. Co., 183 Fed. 51 201
Montevallo v. Village School District, 268 Mo. 217 264

[References are to Sections.]

Montgomery v. Reed, 69 Maine 510 285
Montgomery & Mullen Lbr. Co. v. Quimby, 164 Cal. 250 346
Moody v. Fleming, 4 Ga. 115 335
Moore v. Anderson, 5 Boyce (28 Del.) 477 406, 407
v. Fowle, 139 N. Car. 51 4
v. Helvy, 235 Mo. 443 340
v. Moore, 21 Maine 350 342
v. Walsh, 37 R. I. 436 182
Moran v. Gallagher, 199 Mass. 486 233
v. Lezotte, 54 Mich. 83 73
Morehead v. Hall, 126 N. Car. 213 8
Morgan v. Godbee, 146 Ga. 352 164
v. Jenson, 47 N. Dak. 137 349
v. Mowles (Tex. Civ. App.), 61 S. W. 155 212
v. Railroad Co., 96 U. S. 716 362
v. Renfro, 124 Ky. 314 189
v. Renfro, 30 Ky. L. 533 195
Morris v. Roberson, 137 Ky. 841 413
v. School Dist. No. 86, 63 Ark. 149 363
Morrison v. Hinkson, 87 Ill. 587 389
v. Kelly, 22 Ill. 609 336
Morrison Dept. Store Co. v. Lewis, 96 W. Va. 277 432
Morrow v. Highland Grove Traction Co., 219 Pa. 619 364
Morse v. Whitcomb, 54 Ore. 412 363
Morton v. Dresser, 108 Mass. 71 326
Mott v. Mott, 68 N. Y. 246 242, 247
Mt. Pleasant v. New York, 199 App. Div. (N. Y.) 315 347
Mounts v. Mounts, 155 Ky. 363 341
Muchenberger v. Santa Monica (Cal.), 275 Pac. 803 310, 325
Muhlker v. Ruppert, 124 N. Y. 627 148
Muir v. Palmater, 125 Misc. (N. Y.) 793 256
Mulch v. Nagle, 51 Cal. App. 559 361
Mulligan v. McGregor, 165 Ky. 222 371
Mulrein v. Weisbecker, 37 App. Div. (N. Y.) 545 400
Munch v. Statler, 109 Minn. 403 317
Munroe v. Pere Marquette R. Co., 226 Mich. 158 348
Munroe's Petition, In re, 245 Mass. 474 371
Munson v. Hallowell, 26 Tex. 475 346
Munter v. Kohre, 107 Misc. 261 429
Murphy v. Bolger, 60 Vt. 723 399
v. Doyle, 37 Minn. 113 336
Murray v. Dickson, 57 Tex. Civ. App. 620 419
v. Huntingburg, 187 Ind. 504 366
Muskogee v. Hancock, 58 Okla. 1 397
Myers v. Dodd, 9 Ind. 290 419
Myrick v. Peet, 56 Mont. 13 307, 324

N

Narron v. Wilmington &c. R. Co., 122 N. Car. 856 348
Narton v. Young, 6 Colo. App. 187 422
Neagle v. Tacoma, 127 Wash. 528 376
Neblett v. R. S. Sterling Inv. Co. (Tex. Civ. App.), 233 S. W. 604 347
Nebraska v. Iowa, 143 U. S. 359 298
Nebraska v. Missouri, 196 U. S. 23 298
Neilson v. Hummel, 280 Pa. 483 427
Nelson v. Hall, 17 Fed. Cas. No. 10107 88
v. Johnson, 189 Ky. 815 341
v. Madison, 3 Biss. (U. S.) 244 361
v. Madison, 17 Fed. Cas. No. 10110 363, 367
v. Randolph, 222 Ill. 531 366, 386
Newark v. Watson, 56 N. J. L. 667 386
Newberry v. Bunda, 137 Mich. 69 419

[References are to Sections.]

Newburg v. Kienle, 60 Ore. 486 257
New Castle v. Hunt, 47 Ind. App. 249 259
Newell v. Hill, 2 Metc. (43 Mass.) 180 420
New Jersey Zinc &c. Co. v. Morris Canal &c. Co., 44 N. J. Eq. 398 283, 291
New Orleans v. Carrollton Land Co., 131 La. 1092 373
v. Morris, 19 Fed. Cas. 10 292
New Orleans M. &c. R. Co. v. Frederic, 46 Miss. 1 287
Newport v. Taylor, 16 B. Mon. (55 Ky.) 699 390
Newport News &c. Elec Co. v. Lake, 101 Va. 334 361
Newsom v. Pryor, 7 Wheat. (20 U. S.) 7 71
Newton v. Dallas (Tex. Civ. App.), 201 S. W. 703 373, 379
New Windsor v. Stocksdale, 95 Md. 196 379
New York v. Carleton, 113 N. Y. 284 348
v. De Peyster, 120 App. Div. (N. Y.) 762 338
v. New York Cent. R. Co., 198 App. Div. (N. Y.) 517 347
New York Cent. &c. R. Co. v. Brennan, 24 App. Div. (N. Y.) 343 349
v. Buffalo, 200 N. Y. 113 233
New York Dock Co. v. Flinn-O'Rourke Co., 121 Misc. (N. Y.) 155 290
Nicholas v. Title &c. Co., 79 Ore. 226 375
Nichols v. New England Furn. Co., 100 Mich. 230 238, 288
Nicolin v. Schneiderhan, 37 Minn. 63 110, 163, 164
Nicolls Copper Co. v. Connolly, 208 App. Div. (N. Y.) 667 381
Niles v. Patch, 13 Gray (79 Mass.) 254 285
Nilson v. Kahn, 314 Ill. 275 220, 226, 350, 398, 436
Nippert v. Warneke, 128 Cal. 501 427
Nirdlinger v. Stevans, 262 Fed. 591-602 290, 291, 293, 297
Nissley v. Moeslein, 23 Pa. Super. Ct. 119 83
Noland v. Weems (Tex. Civ. App.), 141 S. W. 1031 350
Norfolk v. Nottingham, 96 Vt. 34 383, 392
Norfolk Heating &c. Co. v. Vernam, 75 Conn. 662 400
Normant v. Eureka Co., 98 Ala. 181 341
Northern Pac. R. Co. v. Cash, 67 Mont. 585 347, 350, 351
v. Ely, 197 U. S. 1 335, 356
v. Hirzel, 29 Idaho 438 287
v. Kranich, 52 Fed. 911 339
v. Pyle, 19 Idaho 3 347
Northern R. Co. v. Demarest, 94 N. J. L. 68 347
North Fort Worth Townsite v. Taylor (Tex. Civ. App.), 262 S. W. 505 340
Northwestern Safe & Trust Co. v. Chicago, 247 Ill. 248 234
Norton v. Randolph, 176 Ala. 381 424
v. State, 11 Ala. App. 216 362
Norwalk v. Podmore, 86 Conn. 658 291
Norwalk Heating &c. Co. v. Vernam, 75 Conn. 662 399, 400
Norway Plains Co. v. Bradley, 52 N. H. 86 287
Nott v. Thayer, 15 N. Y. Super. Ct. 10 297
Novotny v. Danforth, 9 S. Dak. 301 408, 409
Noyes v. Collins, 92 Iowa 566 286
Nuller v. Gist, 91 Tex. 335 342

O

Oakes v. DeLancey, 71 Hun (N. Y.) 49 285
v. De Lancey, 133 N. Y. 227 206, 285
Oakland v. Wheeler, 34 Cal. App. 442 290
Oakland Cemetery Co. v. Peoples Cemetery Co., 93 Tex. 569 380

[References are to Sections.]

Obert v. Dunn, 140 Mo. 476 408
O'Brien v. Clark, 104 Md. 30 202, 206
Ocean City Hotel & Dev. Co. v. Sooy, 77 N. J. L. 527 238
O'Donnell v. H. K. Porter Co., 238 Pa. 495 363
O'Herrin v. Brooks, 67 Miss. 266 135
Oklahoma v. Texas, 258 U. S. 574 281, 283, 287
v. Texas, 260 U. S. 606, 631 283, 287, 298
v. Texas, 268 U. S. 252 298
Oldig v. Fisk, 1 Nebr. (Unoff.) 124 340
v. Fisk, 53 Nebr. 156 342
Olinger v. Watson, 160 App. Div. (N. Y.) 96 369
Omaha &c. R. Co. v. Rickards, 38 Nebr. 847 349
Omodt v. Chicago, M. &c. R. Co., 106 Minn. 205 339
Oregon City v. Oregon &c. R. Co., 44 Ore. 165 364
Oregon Home Builders v. Eisman, 88 Ore. 611 161, 164, 171
Orena v. Santa Barbara, 91 Cal. 621 248, 258, 263
Orr v. Hadley, 36 N. H. 575 310
Ousley v. Lambeth (Mo. App.), 199 S. W. 594 421
Oven v. Davidson, 10 U. C. C. P. 302, 310 81
Overacker v. Cole, 16 Johns. (N. Y.) 257 165
Overland Mach. Co. v. Apenfels, 30 Colo. 163 236
Owen v. Brockport, 208 Ill. 35 366

P

Page v. Brooks, 79 N. H. 70 394
Pahne v. Hall, 192 Iowa 780 295
Paige v. Schenectady R. Co., 77 App. Div. (N. Y.) 571 235.2
Paine v. Consumers Forwarding & Storage Co., 71 Fed. 626 246
v. Upton, 87 N. Y. 327 203
v. Woods, 108 Mass. 160 286
Paine Lbr. Co. v. Oshkosh, 89 Wis. 449 347
v. United States, 55 Fed. 854 283
Palen v. Ocean City, 64 N. J. L. 669 364
v. Ocean City, 72 N. J. L. 15 386
Palmer v. Dougherty, 33 Maine 502 246
v. Magers, 85 W. Va. 415 184
v. Mann, 206 App. Div. (N. Y.) 484 287
v. Osborne, 115 Iowa 714 324
Panama Ice &c. Co. v. Atlanta &c. R. Co., 71 Fla. 419 291
Paragould v. Lawson, 88 Ark. 478 364
Pardee v. Johnston, 70 W. Va. 347 16
Parks v. Loomis, 6 Gray (72 Mass.) 467 155
Parriott v. Hampton, 134 Iowa 157 373
Parsons v. Dils, 172 Ky. 774 351
Partridge v. Richmond, 36 Cal. App. 389 371, 379
Pastorino v. Detroit, 182 Mich. 5 347
Patapsco Guano Co. v. Bowers-White Lbr. Co., 146 N. Car. 187 286, 288
Paterson v. East Jersey Water Co., 74 N. J. Eq. 49 287
Patten v. New York Elev. R. Co., 3 Abb. New Cas. (N. Y.) 306, 342 243
Patterson &c. R. Co. v. Patterson, 24 N. J. Eq. 158 390
Paul v. Carver, 26 Pa. 223 231
Peasley v. Drisko, 102 Maine 17 11
Pence v. Langdon, 99 U. S. 578 318, 319
Peninsular Naval Stores Co. v. Tomlinson, 244 Fed. 598 15
Penley v. Emmons, 117 Maine 108 65
People v. Allen, 209 Mich. 102 233
v. Baldwin, 197 App. Div. (N. Y.) 285 347
v. Banning Co., 167 Cal. 643 347

[References are to Sections.]

People v. Call, 129 Misc. (N. Y.) 862 203
v. Gaydica, 122 Misc. (N. Y.) 31 395
v. Johnson, 237 Ill. 237 387
v. Kellogg, 67 Hun (N. Y.) 546 369
v. Langenour, 25 Cal. App. 44 381
v. Southern Pac. R. Co., 68 Cal. App. 153 381
v. Steeplechase Park Co., 218 N. Y. 459 299
v. Underhill, 144 N. Y. 316 371
People ex rel. v. Economy L. &c. Co., 241 Ill. 290 283
v. Massieon, 279 Ill. 312 373
v. Riegelman, 187 App. Div. (N. Y.) 896 299
People of Porto Rico v. Fortuna, 279 Fed. 500 285
Peoples Gas Light &c. Co. v. Chicago, 255 Ill. 612 384
Percival v. Chase, 182 Mass. 371 102
Pereles v. Gross, 126 Wis. 122 218, 220, 222
v. Magoon, 78 Wis. 27 222
Pere Marquette R. Co. v. Graham, 150 Mich. 219 14, 219
Perich v. Maurer, 29 Cal. App. 293 94, 321
Perkins v. Blood, 36 Vt. 273 342
Perry v. Buswell, 113 Maine 399 8, 9, 11, 65
Perth Amboy Trust Co. v. Perth Amboy, 75 N. J. L. 291 376
Peters v. Hendricks, 225 Ky. 722 311
v. Reichenback, 114 Wis. 209 307
Petty v. Paggi Bros. Oil Co. (Tex. Civ. App.), 241 S. W. 574 91
Pfrommer v. Taylor, 4 Boyce (27 Del.) 113 438
Phelps v. Mankato, 23 Minn. 276 371
Philadelphia v. Commonwealth, 284 Pa. 225 290
v. Hinkle, 64 Pa. Super. Ct. 495 264
Philadelphia Co. v. Stimson, 223 U. S. 605 293
Philadelphia Museums v. Pennsylvania University, 251 Pa. 115 373, 392
Philbin v. Carr, 75 Ind. App. 560 337, 338, 340, 344, 346
v. Marlborough Elec. Co., 218 Mass. 394 414
Pickard v. Callens, 23 Barb. (N. Y.) 444 424
Pickett v. Nelson, 79 Wis. 9 327
Pickman v. Trinity Church, 123 Mass. 1 102
Pierro v. Minneapolis, 139 Minn. 394 339
Pike v. Munroe, 36 Maine 309 65
Pillsbury v. Alexander, 40 Nebr. 242 366
Pine v. Reynolds, 187 Iowa 379 347
Pingry v. Watkins, 17 Vt. 377 8
Pinney v. Winsted, 79 Conn. 606 45, 187
Pitcairn v. Chester, 135 Fed. 587 368, 381
Pitney v. Huested, 8 App. Div. (N. Y.) 105 247
Pittsburgh v. Baltimore, 73 Md. 326 378
Pittsburgh, C. C. & C. R. Co. v. Stickley, 155 Ind. 312 347
Placer County v. Lake Tahoe R. &c. Co., 58 Cal. 764 347
Plainfield-Union Water Co. v. Plainfield, 84 N. J. L. 634 285
Plumer v. Johnston, 63 Mich. 165 246
Pohlman v. Evangelical Lutheran Trinity Church, 60 Nebr. 364 199
Point Pleasant v. Caldwell, 87 W. Va. 277 234
Pomeroy v. Mills, 3 Vt. 279 392
Poole v. Rehoboth, 9 Del. Ch. 192 364, 378, 379, 388
Popplewell v. Hodkinson, L. R. 4 Exch. 248 401
Porter v. Gaines, 151 Mo. 560 223
v. International Bridge Co., 200 N. Y. 234 388
v. Stuttgart, 135 Ark. 48 347
Port Huron v. Chadwick, 52 Mich. 320 384

[References are to Sections.]

Post v. Wilkes-Barre Connecting R. Co., 286 Pa. 273 152
Post Hill Imp. Co. v. Brandegree, 74 Conn. 338 164
Poudler v. Minneapolis, 103 Minn. 479 383
Pounds v. Lee Ave. Theater Co., 84 Misc. (N. Y.) 623 392
Power v. Kitching, 10 N. Dak. 254 339
Powers v. Bank of Oroville, 136 Cal. 486 170
v. Jackson, 50 Cal. 429 83, 116
Powlowski v. Mohawk Golf Club, 204 App. Div. (N. Y.) 200 371
Prall v. Burckhartt, 299 Ill. 19 273, 378
Prather v. Western Union Tel. Co., 89 Ind. 501 349
Pratt v. Ard, 63 Kans. 182 349
Prescott v. Edwards, 117 Cal. 298 234, 362
Preston v. Bowmar, 2 Bibb. (5 Ky.) 493 193
v. Bowmar, 6 Wheat. (19 U. S.) 580 189, 193
v. Prewit, 2 A. K. Marsh (9 Ky.) 155 226
Preston Coal &c. Co. v. Raven Run Coal Co., 200 Fed. 465 398
Price v. DeReyes, 161 Cal. 484 307, 312
v. Methodist Episcopal Church, 4 Ohio St. 515 389
Princeton v. Gustavson, 241 Ill. 566 368
v. Hanna, 187 Ind. 582 347
Pritchard v. Rebori, 135 Tenn. 328 45, 72, 119, 187
Proctor v. Maine Cent. R. Co., 96 Maine 458 285
Producers Oil Co. v. Hanzen, 238 U. S. 325 287
Providence v. Comstock, 27 R. I. 537 347
Purtle v. Bell, 225 Ill. 523 308
Putzel v. Drovers &c. Nat. Bank, 78 Md. 349 429, 435

Q

Quelch v. Futch, 172 N. Car. 316 15
Quigley v. Clough, 173 Mass. 429 419
Quillen v. Betts, 1 Penn. (Del.) 53 421
Quinn v. Baage, 138 Iowa 426 325
v. Windmiller, 67 Cal. 461 312, 324
Quinnin v. Reimers, 46 Mich. 605 216

R

Raben v. Risnikoff, 95 App. Div. (N. Y.) 68 207
Racine v. Emerson, 85 Wis. 80 257
v. J. I. Case Plow Co., 56 Wis. 539 252, 257
Raide v. Dollar, 34 Idaho 682 283
Ralph v. Clifford, 224 Mass. 58 383
Ralston v. Dwiggins, 115 Kans. 824 76
Ramseaur v. Ball, 59 Tex. Civ. App. 285 152
Ramsey v. Morrow, 133 Ky. 486 195
v. Wilson, 52 Wash. 111 346
Ramstad v. Carr, 31 N. Dak. 504 363, 366, 372, 373, 377
Randall v. Sanderson, 111 Mass. 114 338
Randolph v. Hinck, 277 Ill. 11 295
Rasch v. Noth, 99 Wis. 285 399
Rathgaber v. Tonawanda, 59 Hun (N. Y.) 628 380
Raton v. Pollard, 270 Fed. 5 347
Ray v. Sweeney, 14 Bush (77 Ky.) 1 396
Read v. Bartlett, 255 Ill. 76 136
Red Bluff v. Walbtidge, 15 Cal. App. 770 347
Reedy v. Camfield, 159 Ill. 254 346
Rees v. Chicago, 38 Ill. 322 360
Reformed Church v. Schoolcraft, 65 N. Y. 134 347
Regan v. Keyes, 204 Mass. 294 411
Reichert v. Ellis Ferry Co., 184 Ky. 150 297
Reichert Milling Co. v. Freeburg, 217 Ill. 384 373, 375
Reid v. Board of Education, 73 Mo. 295 390
v. Klein, 138 Ind. 484 109, 265
Reinhardt v. Chalfont, 12 Del. Ch. 214 383

[References are to Sections.]

Reisland v. Schick, 111 Ore. 42 318
Rennyson's Appeal, In re, 94 Pa. 147 413
Requa v. Rochester, 45 N. Y. 129 379
Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668 131, 142, 184
Reusens v. Lawson, 91 Va. 226 187
Reynolds v. Ellison (Mo.) 225 S. W. 948 347
Richards v. Cincinnati, 31 Ohio St. 506 376
v. Public Service Comm., 293 Mo. 625 362, 364
Richardson v. Chickering, 41 N. H. 380 314
v. Watts, 94 Maine 476 17, 198
Richie v. Owsley, 137 Ky. 63 349
Richmond v. Mayo Land &c. Co., 120 Va. 545 361
Rideout v. Knox, 148 Mass. 368 424
Riley v. Buchanan, 116 Ky. 625 370
v. Continuous Rail Joint Co., 110 App. Div. 787 401
Ringgold Lodge v. DeKalb Lodge, 157 Ky. 203 427
Rioux v. Cormier, 75 Wis. 566 200
Rippey v. Harrison, 66 Wash. 109 321
Ritter Lbr. Co. v. Montvale Lbr. Co., 169 N. Car. 80 79
Riverside v. MacLain, 210 Ill. 308 389
Robbins v. Moore, 129 Ill. 30 345
Robbs v. Woolfolk (Tex. Civ. App.), 224 S. W. 232 326
Roberts v. Birks, 223 Ill. 291 312, 327
v. Blount (Tex. Civ. App.), 120 S. W. 933 325
v. Columbia G. &c. Tpk. Co., 98 Tenn. 133 361
v. Decker, 120 Wis. 102 288
v. Mathews, 137 Ala. 523 361
v. Richerds, 84 Maine 1 336
v. Taylor, 47 N. Dak. 146 286, 287
v. White, 25 N. Y. Super. 425 398
Robinson v. Clapp, 65 Conn. 365 413, 415
v. Myers, 67 Pa. 9 159, 160
v. Schiltz, 135 Mo. App. 32 422
v. Wells, 142 Ky. 800 287
Robison v. Fetterman (Pa.), 14 Atl. 245 418
Rochester, In re, 8 App. Div. (N. Y.) 609 205
Rose v. Elizabethtown, 275 Ill. 167 370, 377, 381, 383
v. Linderman, 147 Mich. 372 419, 420
Rosenmeir v. Mahrenholz, 179 Ind. 467 356
Rosenson v. Bochenek (N. J.), 141 Atl. 753. 364
Rosenstock v. Laue, 67 Misc. (N. Y.) 251 411
Round Mt. Lbr. &c. Co. v. Bass, 136 Tenn. 687 351
Rowan v. Newbern, 32 Ga. App. 363 351
Rowe v. Bowen, 113 Kans. 641 246
v. James, 71 Wash. 267 237
v. Kidd, 249 Fed. 882 169, 180
Rowzee v. Pierce, 75 Miss. 846 389, 392
Rozell v. Andrews, 103 N. Y. 150 363
Rucker v. Steelman, 73 Ind. 396 2
Ruddiman v. Taylor, 95 Mich. 547 366
Rudnick v. Murphy, 213 Mass. 470 396
Rudolph v. Sales, 32 Ky. L. 475 179, 187
Russell v. Chicago &c. Elec. R. Co., 205 Ill. 155 373
v. Hannibal &c. R. Co., 83 Mo. 507 418
v. Lincoln, 200 Ill. 511 367, 373
Rutkoski v. Zolaski, 90 Conn. 108 402
Rutland Drainage Dist., In re, 148 Wis. 421 283
Rutter v. Fidler, 11 Pa. 181 396
Ryckman v. Gillis, 57 N. Y. 68 401
Ryerson v. Chicago, 247 Ill. 185 234, 366, 378

[References are to Sections.]

S

Saccone v. West End Trust Co., 224 Pa. 554 237, 246
Saddler v. Alexander, 21 Ky. L. 1835 424
Sage v. Morosick, 69 Minn. 167 349
St. Anthony Falls Water-Power Co. v. St. Paul Water Comrs., 168 U. S. 349 283, 289
St. Joseph, St. L. &c. R. Co. v. Smith, 170 Mo. 327 347
St. Louis v. Clegg, 289 Mo. 321 363
v. Rutz, 138 U. S. 226 293
v. Wetzel, 110 Mo. 260 363
St. Louis S. F. R. Co. v. McBride, 104 Okla. 216 347
St. Louis, S. W. R. Co. v. Davis, 75 Ark. 283 349
St. Paul v. Chicago M. &c. R. Co., 45 Minn. 387 348
Salter v. Jones, 10 Vroom (39 N. J. L.) 469 244
Samples v. Kergan, 109 Wash. 503 132
v. Smyth, 30 Ky. L. 498 312
San Antonio v. Rowley, 48 Tex. Civ. App. 376 366
v. San Antonio Academy (Tex. Civ. App.), 259 S. W. 995 373, 380
Sanborn v. Gunter, 84 Tex. 273 184
v. Mueller, 38 Minn. 27 14
Sander v. Riverside, 118 Fed. 720 364
Sanders v. Godding, 45 Iowa 463 203, 207
v. Riedinger, 30 App. Div. (N. Y.) 277 336
Sanderson v. Baltimore, 135 Md. 509 383
Sandretto v. Wahlsten, 124 Minn. 331 16
San Francisco v. Calderwood, 31 Cal. 585 361
Santa Ana v. Santa Ana Valley Irr. Co., 163 Cal. 211 387
Saperstein v. Berman, 119 Misc. 205 424, 425
Saunders v. Publishers Paper Co., 208 Fed. 441 68
Savannah v. Barnes, 148 Ga. 317 377, 386
v. Bartow Inv. Co., 137 Ga. 198 386
Sawyer v. Kendall, 10 Cush. (64 Mass.) 241, 244 340
Sayles v. Bemis, 57 Wis. 315 421
Scaife v. Western N. Car. Land Co., 90 Fed. 238 351
Scarborough v. Woodill, 7 Cal. App. 39 415
Schade v. Albany, 16 N. Y. S. 262 373
Schieble v. Hart, 11 Ky. L. 607 324
Schlossnagle v. Kolb, 97 Md. 285 341
Schmidt v. Battle Creek, 188 Iowa 869 363, 375
v. Lewis, 63 N. J. Eq. 565 431, 433
Schmoe v. Cotton, 167 Ind. 364 406, 407
Schmuck v. Beck, 72 Mont. 606 420, 421
Schnare v. Gehman, 9 Iowa 283 419
Scholeben v. Swain, 130 App. Div. (N. Y.) 521 246
Scholl v. Kinitzer, 93 Wis. 307 421
Schulman v. Cornman, 221 App. Div. (N. Y.) 170 207
Schulte v. Warren, 218 Ill. 108 283
Schuster v. Barber Asphalt Pav. Co., 24 Ky. L. 2346 371
v. Myers, 148 Mo. 422 218, 224
Schutze v. Dabney (Tex. Civ. App.), 204 S. W. 342 235.2
Schwalm v. Beardsley, 106 Va. 407 150
Schwerdtle v. Placer County, 108 Cal. 589 363
Scott v. Baird, 145 Mich. 116 426
v. Des Moines, 64 Iowa 438 367
v. Donora Southern R. Co., 222 Pa. 634 347
v. Jackson, 93 Ill. App. 529 418, 420
v. Lattig, 227 U. S. 229 281
v. Weisburg, 3 Tex. Civ. App. 46 191

[References are to Sections.]

Scottish-American Mtg. Co. v. Russell, 20 S. Dak. 42 428
Scrivner v. Johnson, 166 Ark. 140 326
Seaboard Air Line Ry. v. Banks, 207 Ala. 194 347
Seaboard Air Line R. Co. v. Greenfield, 160 Ga. 407 371
v. Sikes, 4 Ga. App. 7 283
Sea Coast R. E. Co. v. American Timber Co., 92 N. J. Eq. 219 293, 296
Seaman v. Smith, 24 Ill. 521 285
Sears v. Chicago, 247 Ill. 204 233, 234
Seattle v. Hill, 23 Wash. 92 372
v. Oregon &c. R. Co., 255 U. S. 56 290
Security Land & Exp. Co. v. Burns, 193 U. S. 167 117, 184, 187
Seigheuret v. Fahey, 27 Minn. 60 346
Sengfelder v. Hill, 21 Wash. 371 2, 66
Serry v. Waterbury, 82 Conn. 567 247
Sewers v. Hacklander, 219 Mich. 143 287
Sexaure v. Wilson, 136 Iowa 357 419
Shackelford v. Walker, 156 Ky. 173 212
Shamberg v. Board of Riparian Comrs., 72 N. J. L. 132 291
Sharpless v. Boldt, 218 Pa. 372 400, 405
Shaw v. Johnson, 17 Idaho 676 235.1, 365, 366
v. State, 125 Ala. 80 423
Shawmut Mfg. Co. v. Benton, 123 Maine 121 287
Shearer v. Reno, 36 Nev. 443 371, 383
Sheffield Car Co. v. Constantine Hydraulic Co., 171 Mich. 423 315
Sheldon v. Michigan Cent. R. Co., 161 Mich. 503 321
v. Sherman, 42 N. Y. 484 412
Shelton v. Franklin, 224 Mo. 342 361
Shenley v. Pittsburgh, 105 Pa. 472 159, 238
Shevlin v. Johnston, 56 Cal. App. 563 414
Shindler v. Lutcher &c. Lbr. Co. (Tex. Civ. App.), 107 S. W. 941 212
Shirk v. Chicago, 195 Ill. 298 387
Shirley v. Crabb, 138 Ind. 200 432
Shively v. Bowlby, 152 U. S. 1, 31 281, 285, 287
Shiverich v. R. J. Gunning Co., 58 Nebr. 24 426
Siebel v. Cohen, 54 N. Y. Super. Ct. 436 204, 207
Sikes v. Moline Consumers Co., 293 Ill. 112 287
Silsby v. Kinsley, 89 Vt. 263 87
Silva v. Azevedo, 178 Cal. 495 308
Silver King Coalition Mines Co. v. Conklin Min. Co., 255 U. S. 151 142
Simon v. Nance, 45 Tex. Civ. App. 480 401
Simpson v. Klipstein, 89 N. J. Eq. 543 383
Singer v. New York, 47 App. Div. (N. Y.) 42 264
Sipe v. Alley, 117 Va. 819 383
Skala v. Lindbeck, 171 Minn. 410 339
Skinner v. Wilder, 38 Vt. 115 414
Slauson v. Goodrich Transp. Co., 94 Wis. 642 286
Sleeper v. Laconia, 60 N. H. 201 287
Sloan v. Biemiller, 34 Ohio St. 492 286
Sluyter v. Schwab, 73 Nebr. 370 340
Smathers v. Jennings, 170 N. Car. 601 8
Smiley v. Fries, 104 Ill. 416 2
Smith v. Almond, 157 La. 265 226
v. Berry, 202 Ky. 502 336
v. Buffalo, 90 Hun (N. Y.) 118 373
v. Chapman, 10 Gratt. (Va.) 445 189
v. Chicago &c. R. Co., 127 Mo. App. 160 418
v. Gilley (Tex. Civ. App.), 135 S. W. 1107 312
v. Harbaugh, 216 Ala. 202 135, 155
v. Hosmer, 7 N. H. 436 338

[References are to Sections.]

Smith v. Hutchison, 104 Tenn. 394 134
v. King County, 80 Wash. 273 370, 383
v. Minneapolis, 112 Minn. 446 233
v. Opelika, 165 Ala. 630 387
v. Price (Tex. Civ. App.), 230 S. W. 836 347
v. Rochester, 92 N. Y. 463 286
v. Rogers, 227 Mich. 280 377, 386
v. Stacey, 68 App. Div. (N. Y.) 521 256, 312
v. Trabue, 1 McLean (U. S.) 87 341
v. Vermont Marble Co., 99 Vt. 384 112, 174
Smyth v. McCool, 22 Hun (N. Y.) 595 148
Snoddy v. Bolen, 122 Mo. 679 378
Snodgrass v. Snodgrass, 212 Ala. 74 212
Snow v. Mt. Desert Island R. E. Co., 84 Maine 14 285
Somers v. McMordie, 155 Cal. xvi 165
Sonnek v. Minnesota Lake, 50 Minn. 588 249
Southerland v. Jackson, 30 Maine 462 246
Southern Iron &c. Co. v. Stowers, 189 Ala. 314 350
Southern Pac. R. Co. v. Ferris, 93 Cal. 263 387
Southern R. Co. v. Vann, 142 Tenn. 76 347
Southern Wis. Power Co., In re, 140 Wis. 245 283
South Park Comms. v. Montgomery Ward & Co., 248 Ill. 299 388
South Penn Oil Co. v. Knox, 68 W. Va. 362 165
Southwestern Land Co. v. Evans (Tex. Civ. App.), 275 S. W. 1078 351
Sparhawk v. Twitchell, 1 Allen (83 Mass.) 450 422
Spencer v. Levy (Tex. Civ. App.), 173 S. W. 550 13
Spero v. Shultz, 14 App. Div. (N. Y.) 423 429
Spinning v. Pugh, 65 Wash. 490 104, 110, 163
Spires v. Los Angeles, 150 Cal. 64 389
Spohn v. Dines, 174 Pa. 174 409
Springer v. Darlington, 207 Ill. 238 426
Stack v. Coffin, 105 Mass. 328 246
v. Tennessee Land Co., 209 Ala. 449 367
Stafford v. King, 30 Tex. 257 71
Stahlman v. Riordan (Tex. Civ. App.), 227 S. W. 726 215
Standefer v. Vaughn (Tex. Civ. App.), 219 S. W. 484 177
Stange v. Hill &c. St. R. Co., 54 Iowa 669 392
Stanley v. County Surveyor, 126 Kans. 95 215
v. Schwalby, 147 U. S. 508 347, 348
Stark v. Meriwether, 98 Kans. 10 297
Starr v. Standard-Tilton Mill Co., 183 Ill. App. 454 403
Starrett v. Baudler, 181 Iowa 965 403, 404
Starr Street, In re, 73 Misc. (N. Y.) 380 372, 373
State v. Adams, 91 Kans. 642 423
v. Atherton, 16 N. H. 203 371, 373
v. Auffart, 192 Mo. App. 133 390
v. Bradbury, 40 Maine 154 372
v. Brown, 6 Boyce (29 Del.) 179 377
v. Buck, 74 Vt. 29 422
v. Campbell, 133 N. Car. 640 423
v. Dreyer, 229 Mo. 201 390
v. Faudre, 54 W. Va. 122 283
v. Frank W. Coy Real Estate Co., 44 R. I. 357 362, 377
v. Gilmanton, 9 N. H. 461 286
v. Illinois Cent. R. Co., 33 Fed. 730, 755 291
v. Korrer, 127 Minn. 60 286, 287, 291
v. Lamb, 30 N. Car. 229 417
v. McCracken, 118 N. Car. 1240 423

[References are to Sections.]

State v. Muncie Pulp Co., 119 Tenn. 47 283, 287, 295
v. Nolegs, 40 Okla. 479 287
v. Richardson, 140 La. 329 292
v. Sandusky M. &c. R. Co., 111 Ohio St. 512 388
v. Schwin, 65 Wis. 207 367
v. Scott, 89 Wash. 63 347
v. Scott, 91 W. Va. 513 342
v. Southard, 6 Penniwill (Del.) 247 383
v. Stutzner, 153 La. 233 210
v. Thompson, 77 W. Va. 765 15
v. Trask, 6 Vt. 355 392
v. Willoughby, 7 Boyce (Del.) 83 349
State ex rel. v. Dreyer, 229 Mo. 201 390
v. Gerbing, 56 Fla. 603 283
v. King County, 102 Wash. 331 275
v. Meaher, 213 Ala. 466 363, 364, 366
v. Sandusky M. &c. R. Co., 111 Ohio St. 512 390
State of Iowa v. Carr, 191 Fed. 257 294
State Sav. Bank v. Stewart, 93 Va. 447 16
Stearns v. Rice, 14 Pick. (31 Mass.) 411 267
Stebbins v. Eddy, Fed. Cas. No. 13342 207
Steeneck v. O'Leary Realty &c. Co., 80 Misc. (N. Y.) 507 402, 407
Stefanick v. Fortona, 222 Mass. 83 78, 105, 122
Steinhauser v. Spraul, 114 Mo. 551 339
Steinwand v. Brown, 38 N. Dak. 602 356
Sterling v. Pearson, 25 Nebr. 684 261
Steusoff v. Jackson, 40 Tex. Civ. App. 328 172
Stevens v. Arnold, 262 U. S. 266 297
v. King, 76 Maine 197 286
Stevenson v. Chattanooga, 20 Fed. 586 378
Stevenson v. Pucci, 32 Misc. (N. Y.) 464 397
v. Wallace, 27 Gratt. (Va.) 77 403, 407
Stewart v. Stewart, 83 Wis. 364 345
v. Turney, 203 App. Div. (N. Y.) 486 286
v. Turney, 117 Misc. (N. Y.) 398 286
v. Turney, 237 N. Y. 117 286
Stillman v. Olean, 228 N. Y. 322 383
Stimmel v. Brown, 7 Houst. (12 Del.) 219 404
Stockwell v. Dunckel, 174 App. Div. (N. Y.) 481 369, 380
Stoever v. Gowen, 280 Pa. 424 383
Stollenwerck v. Greil, 205 Ala. 217 387
Stone v. Richardson, 206 Iowa 419 327
Storer v. Freeman, 6 Mass. 435 283, 285
Stovall v. Coggins Granite Co., 116 Ga. 376 432
Stover v. Jack, 60 Pa. 339 283
Streuber v. Alton, 319 Ill. 43 376
Strong J. Hunnicutt v. Peyton, 102 U. S. 333 354
Stroup v. Rauschelbach, 217 Mo. App. 236 413, 424
Stuart v. Clark, 2 Swan (32 Tenn.) 9 287
Sturgill v. Sturgill, 180 Ky. 170 420
Suffleton v. Nelson, 2 Saw. (U. S.) 540 340
Sullivan v. Zeiner, 98 Cal. 346 401, 404, 407
Sun Dial Ranch v. May Land Co., 61 Ore. 205 283
Surghenor v. Ducey (Tex. Civ. App.), 139 S. W. 22 351
Sutton v. Groll, 42 N. J. Eq. 213 378
Swift v. Calnan, 102 Iowa 206 431
Switzer v. Davis, 97 Iowa 266 433
Swope v. Ward, 185 Mo. 316 399
Syracuse v. Cook, 187 App. Div. (N. Y.) 578 266, 267

[References are to Sections.]

Syracuse v. Cooney, 228 N. Y. 530 266
v. Philibosian, 190 N. Y. S. 330 266

T

Tagliaferri v. Grande, 16 N. Mex. 486 288
Talbot v. Smith, 56 Ore. 117 134
Talifer Co. v. Falk, 105 Misc. (N. Y.) 6 111
Tappan v. Boston Water Power Co., 157 Mass. 24 283
Taylor v. Asher, 286 Fed. 721 351
v. Austin, 83 Nebr. 581 249
v. Breathitt Coal Iron &c. Co., 185 Fed. 854 349
v. Higgins Oil & Fuel Co. (Tex. Civ. App.), 2 S. W. (2d) 288 176
Tebbets v. Estes, 52 Maine 566 267
Teeper v. Taylor, 141 Mo. App. 282 412
Tempel v. United States, 248 U. S. 121 287
Temple v. Benson, 213 Mass. 128 93, 131, 151
Temple Lbr. Co. v. Felts (Tex. Civ. App.), 260 S. W. 228 142
Tennis Coal Co. v. Sackett, 172 Ky. 729 349, 351, 354
Terrell v. Hart, 28 Ky. L. 901 363
Texas &c. R. Co. v. Belcher (Tex. Civ. App.), 226 S. W. 471 347
Thatcher v. Matthews, 101 Tex. 122 130, 134
Thayer v. Bacon, 3 Allen (85 Mass.) 163 326
Thomas v. Hatch, Fed. Cas. 13899 285
Thomas v. Spencer, 66 Ore. 359 342
v. Spencer, 69 Wash. 433 341
v. Vanderslice, 201 Ala. 73 363
Thompson v. Borg, 90 Minn. 209 314
v. DeLong, 267 Pa. 212 435
v. Hill, 137 Ga. 308 97, 154
v. Logan, 166 Ala. 45 4, 337
Thonney v. Rice, 43 Wash. 708 387
Thornberry v. Churchill, 4 T. B. Mon. (20 Ky.) 29 197
Thorndike v. Milwaukee Auditorium Co., 143 Wis. 1 388, 392
Thorpe v. Clanton, 10 Ariz. 94 383
Thrasher v. Royster, 187 Ala. 350 13, 14
Tiffany v. Oyster Bay, 209 N. Y. 1 285
v. Oyster Bay, 234 N. Y. 15 291
Tise v. Whitaker-Harvey Co., 146 N. Car. 374 363
Titus v. Morse, 40 Maine 348 314, 318
v. Pennsylvania R. Co., 87 N. J. L. 157 419
Tobey v. Secor, 60 Wis. 310 342
Tolleston Club v. Carson, 188 Ind. 642 287
v. Lindgren, 39 Ind. App. 448 287
Tomlinson v. Bainaka, 163 Ind. 112 419
Toudouze v. Keller (Tex. Civ. App.), 118 S. W. 185 218
Towland v. Campbell, 224 Ky. 1 269
Towle v. Quante, 246 Ill. 568 337, 338, 349
Town of Hoxie v. Gibson, 150 Ark. 432 272
Traute v. White, 46 N. J. Eq. 437 431
Tri-city Art. Ice Co. v. Day, 292 Ill. 545 378
Triplett v. Allen, 26 Gratt. (Va.) 721 203
Tripp v. Bagley (Utah), 276 Pac. 912 315, 325
Trowbridge v. Ehrich, 191 N. Y. 361 235.1
v. Ehrich, 116 App. Div. (N. Y.) 457 246
Troy v. Watkins, 201 Ala. 274 378
Trustees Leland Stanford University v. Miller, 54 Cal. App. 102 325
Trutt v. Spotts, 87 Pa. 339 392
Tuesburg Land Co. v. State, 78 Ind. App. 327 287, 289

[References are to Sections.]

Tunstall v. Christian, 80 Va. 1 403
Turner v. Bowens, 180 Ky. 755 311
v. Creech, 58 Wash. 439 177, 209, 322
v. Moore, 81 Tex. 206 351
v. Neistler, 141 Ga. 27 345
v. Spicer, 198 Ky. 739 326
Tweddell v. South Orange, 95 N. J. L. 327 363, 369, 377
Tyler v. Fickett, 73 Maine 410 114

U

Ulbright v. Baslington, 20 Idaho 539 287
Ulman v. Clark, 100 Fed. 180 134, 212, 324
Underwood v. Waldron, 33 Mich. 232 394
Union Coal Co. v. La Salle, 136 Ill. 119 378
Union Co. v. Peckham, 16 R. I. 64 363
Union Depot St. R. &c. Co. v. Brunswick, 31 Minn. 297 291
Uniontown v. Berry, 24 Ky. L. 1692 364
United New Jersey R. &c. Co. v. Crucible Steel Co., 85 N. J. Eq. 7 371
United Paper Board Co. v. Iroquois Pulp &c. Co., 226 N. Y. 38 289
United States v. Cameron, 3 Ariz. 100 17
v. Casterlin, 14 Fed. 437 345
v. Illinois Cent. R. Co., 154 U. S. 225 385
v. Lane, 260 U. S. 662 287
v. Mission Rock Co., 189 U. S. 391 291
v. Murray, 41 Fed. 862 312
v. Pacheco, 2 Wall. (69 U. S.) 587 283, 285
v. Peachy, 36 Fed. 160 407
v. Rio Grande Dam & Irr. Co., 174 U. S. 690 283
v. River Rouge Imp. Co., 269 U. S. 411 290
v. State Inv. Co., 264 U. S. 206 189
v. Texas, 162 U. S. 1 287
United States Gypsum Co. v. Christenson, 226 Mich. 347 339

V

Valcalda v. Solva Peak Mines, 86 Fed. 90 336
Valentine v. Hynes, 199 Fed. 392 398
Van Buskirk v. Standard Oil Co., 94 N. J. Eq. 686 347
Vance v. Fore, 24 Cal. 435 154, 155
v. Gray, 142 Ky. 267 226
Vanderbilt University v. Williams, 152 Tenn. 664 45, 74, 187
Van Ness v. Boinay, 214 Mass. 340 102
Van Winkle v. Van Winkle, 184 N. Y. 193 104, 241
Veatch v. White, 23 Fed. (2d) 69 298
Veltmans v. Kurtz, 167 Mich. 412 312
Venice v. Madison County Ferry Co., 216 Ill. 345 380
Vermont Marble Co. v. Eastman, 91 Vt. 425 312
Veve v. Sanchez, 226 U. S. 234 181
Viall v. Hurley, 94 Vt. 410 226
Victoria v. Victoria County, 103 Tex. 477 361, 377
v. Victoria County (Tex. Civ. App.), 115 S. W. 67 361
Vier v. Detroit, 111 Mich. 646 347
Vincent v. Mustain, 187 Ky. 843 422
Vinton v. Lyons, 131 La. 673 383
Virginia Hot Springs Co. v. Lowman, 126 Va. 424 347
Voight v. Hunt (Tex. Civ. App.), 167 S. W. 745 307, 308
v. Wallace, 179 Pa. 520 438
Voinche v. Marksville, 124 La. 712 389
Von Bargen v. Ginsberg, 218 App. Div. (N. Y.) 545 207
Von Tobel v. Lewistown, 41 Mont. 226 347

W

Wachstein v. Christopher, 128 Ga. 229 400

[References are to Sections.]

Wade v. McDougle, 59 W. Va. 113 311
Wadhams v. Swan, 109 Ill. 46 165
Waggeman v. North Peoria, 155 Ill. 545 363
Wahl v. Vetter, 38 Pa. Super. Ct. 234 394
Wait v. May, 48 Minn. 453 238
Wakefield v. Ross, 28 Fed. Cas. No. 17050 201
Walker v. Shackelford, 49 Ark. 503 428
v. Strosnider, 67 W. Va. 39 407, 408, 409, 411
v. Waltrous, 8 Ala. 493 421, 422
Wall v. Salt Lake City, 50 Utah 593 347
v. Wall, 142 N. Car. 387 287
Wallace v. Cable, 87 Kans. 835 363, 367
v. Driver, 61 Ark. 429 287, 293
Wallace Ave., In re, 222 N. Y. 129 372, 373
Wallace Ave., In re, 179 App. Div. (N. Y.) 172 374
Waller v. Dansby, 145 Ark. 306 340
Walsh v. Hill, 38 Cal. 481 65
v. Hopkins, 22 R. I. 418 249, 256
Walz v. Bennett, 95 Conn. 537 290
Ward v. Cochran, 150 U. S. 597 336, 339
v. Middleton (Ky.), 124 S. W. 823 314, 318
Warden v. Addington, 131 Ky. 296 314
Ware v. McQuinn, 7 Tex. Civ. App. 107 180
Warfel v. Knott, 128 Pa. 528 149
Warm Springs Irr. Dist. v. Pacific Stock Co., 270 Fed. 560 233
Warren v. Boggs, 90 W. Va. 329 196, 198
v. Gloversville, 81 App. Div. (N. Y.) 291 288
v. Jacksonville, 15 Ill. 236 360
v. Thomaston, 75 Maine 329 283
Washington v. Moore, 84 Ark. 220 339
v. Steiner, 25 Pa. Super. Ct. 392 264
Washington Female Sem. v. Washington, 18 Pa. Super. Ct. 555 264
Waterford Electric L. H. &c. Co. v. State, 208 App. Div. (N. Y.) 273 287
Waterman Hall v. Waterman, 220 Ill. 569 344
Waters v. Dennis Simmons Lbr. Co., 154 N. Car. 232 175
Watertown v. Cowen. 4 Paige Ch. (N. Y.) 519 392
v. Troeh, 25 S. Dak. 21 370, 377
Watkins v. King, 118 Fed. 524 41
v. Welch Grape Juice Co., 96 App. Div. (N. Y.) 114 264
Watson v. Hogan, 130 Iowa 350 325
v. New York, 67 App. Div. (N. Y.) 573 203
Watson, In re, 54 Cal. App. 269 350
Watt v. Robbins, 160 Iowa 587 287
Weadock v. Champe, 193 Mich. 553 427
Webb v. Demopolis, 95 Ala. 116 287
v. Richardson, 42 Vt. 465 336
Webber v. Gillies, 112 N. Y. S. 397 235.2
v. Pere Marquette Boom Co., 62 Mich. 626 286
Webster v. International &c. R. Co. (Tex. Civ. App.), 193 S. W. 179 348
Weger v. Delran Township, 61 N. J. L. 224 360
Wegge v. Madler, 129 Wis. 412 235.1
Weidlich v. Independent Asphalt Pav. Co., 94 Wash. 395 136
Weill v. Baker, 39 La. Ann. 1102 437
Weinheimer v. Ross, 80 Misc. (N. Y.) 269 108

[References are to Sections.]

Wekheiser v. Foard (Tex. Civ. App.), 108 S. W. 983 144
Wells v. Croton, 69 Misc. (N. Y.) 124 378
v. Jackson Iron Mfg. Co., 47 N. H. 235 198, 320
v. Lagorio, 112 Va. 522 66, 78
Wells Amusement Co. v. Eros, 204 Ala. 239 398
Wemple v. Easthan, 150 La. 247 287
West 205th St., In re, 240 N. Y. 68 289
Westcott v. Craig, 60 Colo. 42 215, 218
Western Min. Mfg. Co. v. Peytona Cannel Coal Co., 8 W. Va. 406 90
Western N. Y. &c. R. Co. v. Vulcan Foundry &c. Co., 251 Pa. 383 347
Western Railway of Alabama v. Alabama G. T. R. Co., 96 Ala. 272 375, 389
Western Union Tel. Co. v. Georgia R. &c. Co., 227 Fed. 276 362
West Roxbury v. Stoddard, 7 Allen (89 Mass.) 158 286
Wetzler v. Nichols, 53 Wash. 285 7, 68
Whalen v. Smith, 183 Iowa 949 336
Wheatley v. San Pedro, L. A. &c. R. Co., 169 Cal. 505 107, 119, 126, 159
Wheeler v. Benjamin, 136 Cal. 51 106
v. Gorman, 80 Minn. 462 336
v. Oakland, 35 Cal. App. 671 363, 380, 386
Whitaker v. Erie Shooting Club, 102 Mich. 454 337
v. McBride, 197 U. S. 510 287
v. Poston, 120 Tenn. 207 16
Whitcomb v. Milwaukie, 61 Ore. 292 93, 130
White v. Bliss, 8 Cush. (62 Mass.) 510 151
v. Edenton, 173 N. Car. 32 347
v. Jefferson, 110 Minn. 276 231, 246
White v. Luning, 93 U. S. 514 118, 119, 152, 169, 170
v. Thompson, 187 Ky. 480 422
White Bear v. Stewart, 40 Minn. 284 377
Whitehead v. Atchison, 136 Mo. 485 152
Whitlock v. Uhle, 75 Conn. 423 425
Whitman v. Daily, 95 Vt. 454 312
Whitmore v. Brown, 100 Maine 410 284
Whitten v. Peace, 188 N. Car. 253 428
Wickersham v. Arr, 9 Iowa 253 428
Widdicombe v. Rosemiller, 118 Fed. 295 287, 293
Widening of State Road, In re, 236 Pa. 141 375
Wiedmer v. West Jersey & S. R. Co., 98 N. J. L. 316 244
Wiehe v. Pein, 281 Ill. 130 377, 386
Wigglesworth v. Brodsky, 7 Boyce (30 Del.) 586 404, 409
Wiley v. Poe, 31 Ill. App. 609 377
Wilkins v. Jewett, 139 Mass. 29 431
Wilkinson v. Lehman-Durr, 136 Ala. 463 340
Willamette Real Estate Co. v. Hendrix, 28 Ore. 485 336, 342, 345
Williams v. Chicago, 247 Ill. 240 378
v. Gallatin, 229 N. Y. 248 389, 390
v. Johnson, 149 Ky. 409 274
v. St. Louis, 120 Mo. 403 218, 219
v. State, 52 Tex. Cr. 371 16
v. Vanderbilt, 145 Ill. 238 220
Williamson v. Gooch, 103 Maine 402 256, 132
v. Pratt, 37 Cal. App. 363 95
v. Tison, 99 Ga. 791 350
Wilson v. Beck, 160 Iowa 276 313
v. Braden, 56 W. Va. 372 335, 336
v. Burton, 96 Mo. App. 686 423

[References are to Sections.]

Wilson v. Chicago Lbr. &c. Co., 129 Fed. 636 156
v. Chicago Lbr. &c. Co., 143 Fed. 705 155, 156
v. Forbes, 13 N. Car. 30 287
v. Irwin, 144 Ky. 311 424
v. Randall, 67 N. Y. 338 207
v. Stork, 171 Wis. 561 308, 327
v. Watson, 144 Ky. 352 287, 293
Wilson Lbr. & Mill. Co. v. Hutton, 152 N. Car. 537 159, 167, 169, 177
Winn v. Cabot, 18 Pick. (35 Mass.) 553 12
Winters v. Bloom, 96 Kans. 443 96, 98
Winthrop Harbor v. Gurdes, 257 Ill. 596 373
Wisconsin Realty Co. v. Lull, 177 Wis. 53 201
Wishart v. McKnight, 178 Mass. 365 340
Witcher v. Holland Waterworks, 65 Hun (N. Y.) 624 390
Witherow v. Tannehill, 194 Pa. 21 405
Witt v. St. Paul &c. R. Co., 38 Minn. 122 10, 162
Wolf v. Scott (Tex. Civ. App.), 253 S. W. 905 175, 180
Wolf Brick Co. v. Lonya, 132 Mich. 162 324
Wolfe v. Scarborough, 2 Ohio St. 361 155
Wolpert v. Chicago, 280 Ill. 187 83, 136, 253
Wood v. Bapp, 41 S. Dak. 195 325
v. Fowler, 26 Kans. 682 287
v. National Water Works Co., 33 Kans. 590 390
v. Ramsey, 71 Md. 9 182, 184
Woodbury v. Venia, 114 Mich. 251 90
Woodruff v. Langford (Iowa), 115 N. W. 1020 338
Woodruff Place v. Rachig, 147 Ind. 517 366
Woods v. State, 10 Ga. App. 476 423
Woodward v. Tudor, 81 Pa. 382 319
Woolf v. Pierce, 209 N. Y. 344 243
Woolworth v. Root, 40 Fed. 723 339
Work v. United Globe Mines, 12 Ariz. 339 348
Worthington v. Wade, 82 Tex. 26 418
Wright v. Mattisen, 18 How. (59 U. S.) 50 344
Wynn v. Garland, 19 Ark. 23 312
Wynne v. Alexander, 7 Ired. L. (29 N. Car.) 237 140

Y

Yarbrough v. Stuckey, 39 Ga. App. 265, 147 S. E. 160 325
Yard v. Ocean Beach Assn., 49 N. J. Eq. 306 285
York v. Hogg, 142 Ky. 704 68
Young v. Hyland, 37 Utah 229 312
v. Knox, 165 Ark. 129 335, 347

Z

Zander v. Valentine Blatz Brewing Co., 95 Wis. 162 399
Zeibold v. Foster, 118 Mo. 349 127
Zellmer v. Martin, 157 Wis. 341 345
Zollinger v. Newton, 172 Iowa 352 383
Zuleger v. Zeh, 160 Wis. 600 263

Legal Elements of Boundaries and Adjacent Properties

CHAPTER I.

BOUNDARY CONTROL.

I. SCOPE AND PURPOSE.

Section.

1. Scope and Purpose.

II. DEED DESCRIPTIONS.

2. Requisites for a Valid Description.
3. General Descriptions.
4. Particular Descriptions.
5. General and Particular.
6. Construction of Deed Descriptions—Deeds to be Construed Against Grantor.
7. Ownership an Aid in Interpretation.
8. Reference to Other Instruments—General.
9. Effect—Extension of Grant.
10. Limitation of Grant.
11. Reference for Source of Title Only.
12. Reference Erroneous.
13. Reference to Plats—General.
14. Effect of Unconformity of Plat to Statutes.
15. Repugnancy—General.
16. Rejection of the False.
17. Limitations.
18. Deed Descriptions as the Basic Data of a Survey—General.
19. Types of Descriptions—General.
20. Descriptions Containing No Quantitative Data.
21. Descriptions Containing Worthless Data.
22. Deeds Containing Quantitative Data Necessitating Only Reasonable Presumptions.
23. Deeds Containing Complete Data.
24. Deed Descriptions Lacking Quantative Data are Worthless.
25. Mathematics Essential in Writing of Deed Descriptions.

III. METHODS OF CONTROLLING BOUNDARIES.

26. General.
27. The Legal Method—Foundation.
28. Characteristics and Limitations.
29. The Engineering Method—Development.
30. Accuracy.
31. Elimination of Error.
32. Application—Cost.
33. Necessity.
34. Advantages—General.
35. Deed Descriptions Rendered Simple.
36. Public Monuments More Enduring Than Private.
37. Public Monuments More Certainly Identified.
38. Public Monuments in Better Harmony Than Private.
39. Horizontal Control Affords Means of Stabilizing and Coordinating Private Monuments.

Section.
40. Permits Construction of Cadastral Maps.
41. Accuracy Encouraged.
42. Disadvantages—Knowledge of Mathematics Necessary.
43. Adjustment Necessary.
44. Time Necessary for Complete Control.
45. Legal Foundation for Controlled Surveys.
46. Availability.
47. Present Use.

IV. THE WRITING OF DEED DESCRIPTIONS.

48. General.
49. Rule for Writing Deed Descriptions.
50. Point of Beginning—Selection.
51. Simplicity Desirable.
52. Point Must Be Definite.
53. Point of Beginning Should Be Actual and Should Be Referenced.
54. The Boundary Lines—General.
55. Directions.
56. Distance.
57. Direction and Distance Must Both Be Given.
58. Examples of Descriptions—In a Controlled Area.
59. In an Uncontrolled Area.

I. SCOPE AND PURPOSE.

[§ 1.] The purpose of this chapter is to develop the attitude of the engineer and, by a consideration of deed descriptions and examples of their application to surveying, to picture the background of the discussions which follow in the remainder of the text. Engineers accept the legal principles regarding boundaries because of their authoritative recognition, but they do not regard them as a constructive solution of the problem of boundary control. Disputes regarding lines arise primarily from carelessness, indifference and ignorance, and therefore constitute a large field for preventative work on the part of both the legal and engineering professions working in harmony. The ultimate solution of the boundary problem is outlined in general terms, but inasmuch as the necessary control has not been established as yet in many localities, including even some of the larger cities, a brief discussion of the writing of deed descriptions under conditions as generally found has been included.

II. DEED DESCRIPTIONS.

[§ 2.] **(A) Requisites for a Valid Description.**—The basic information for a boundary survey is obtained pri-

marily from the description of the property as found in the deed or deeds conveying it and from deeds pertaining to the adjoining properties. The importance of the description has been recognized by the courts who have established that a deed to be valid requires, among other particulars, a thing granted,[1] which must be described with sufficient clearness to distinguish it from other things of the same kind.[2] Furthermore a certain description clearly delineating the land to be conveyed, but not locating it because of its uncertain starting point, has been held to be invalid.[3] However courts are reluctant to declare deeds void because of uncertainty of description. A description by which the property may be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient,[4] for the office of a description is not to identify but to furnish a means of identification,[5] and any description is sufficient by which the identity of the premises can be established.[6] Furthermore if the parties lay out land and the grantee is put in possession, the deed will hold although the description is too vague to furnish means of identification.[7]

[§ 3.] **(B) General Descriptions.** — General descriptions are, as the name implies, broad; but they must not be uncertain and must apply to only one parcel of land. Thus a description reading "all things whatsoever, whether real or personal," without any description or allusion to any

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[1]Barker v. Southern R. Co., 125 N. Car. 596, 34 S. E. 701, 74 Am. St. 658.

[2]Los Angeles County v. Hannon, 159 Cal. 37, 112 Pac. 878, Ann. Cas. 1912B, 1065.

[3]Barker v. Southern R. Co., 125 N. Car. 596, 34 S. E. 701, 74 Am. St. 658.

[4]Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250, citing Smiley v. Fries, 104 Ill. 416.

[5]Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250, citing Rucker v. Steelman, 73 Ind. 396; Los Angeles County v. Hannon, 159 Cal. 37, 112 Pac. 878, Ann. Cas. 1912B, 1065, also note 3.

[6]McDougal v. Southern Pac. R. Co., 162 Cal. 1, 120 Pac. 766.

[7]Barker v. Southern R. Co., 125 N. Car. 596, 34 S. E. 701, 74 Am. St. 658.

particular tract of land, would not be sufficient to pass lands or tenements.[8] Likewise, the description "a house and lot" in a named town is void because of vagueness, whereas "my house and lot" in a named town is sufficient,[9] for it is regarded as the equivalent of "the house and lot in which I now live." Furthermore a description of a property as "one-half of my lot" will not be void for uncertainty, where it can be established by parol that the grantor had but one house and lot at the time of execution.[10]

[§ 4.] (C) **Particular Descriptions.**—The general description is usually followed by another which gives further details regarding the property and usually cites some characteristic that distinguishes the land in question from that of others. This is known as the particular description, and as found in practice it may be so mathematically definite that the engineer can stake out the bounds without reference to other documents or plats, or it may be so broad that from the engineer's standpoint it is general. Thus in a description "my property on Myrtle Avenue, known as the A-B place," the phrase "known as the A-B place"[11] is from the legal viewpoint a particular description in that it gives a name peculiar to the property which distinguishes it from those adjoining. However, as it gives no details which aid in the location, but merely identifies the land, and leaves the bounds to be determined from other sources, the engineer rightly regards it as general.

[§ 5.] (D) **General and Particular.**—The most common form of description is the combined general and particular, usually in the order given, but sometimes reversed. In this arrangement the general often serves as a means of identification and the particular for purpose of definition,

[8]Ingell v. Nooney, 2 Pick. (19 Mass.) 362, 13 Am. Dec. 434.

[9]Carson v. Ray, 7 Jones L. (52 N. Car.) 609, 78 Am. Dec. 267.

[10]Lick v. O'Donnell, 3 Cal. 59, 58 Am. Dec. 383.

[11]Moore v. Fowle, 139 N. Car. 51, 51 S. E. 796.

although it is not necessary that they function in this manner, and each retains its distinguishing characteristics. The two should be in perfect accord and together express the intention of the parties.

[§ 6.] **(E) Construction of Deed Descriptions.—(1) Deeds to Be Construed Against Grantor.**—Where a deed is ambiguous it will be construed most strongly against the grantor.[12] This is because (1) the language of the deed is the language of the grantor, and (2) the grantor is naturally more familiar with the property. This and all other rules of the same nature must, however, yield to the intent of the parties as set forth in the deed or established by permissible extrinsic evidence. It should be noted that the rule as above stated applies to ambiguities and is ineffective where misunderstandings arise because of an incorrect interpretation by one of the parties of a definite and clear description which is a perfect expression of the intention of the other party. Under such circumstances the rules of construction apply, and these permit the grantor by the proper wording of the description to largely overcome the advantage given the grantee by the above rule.

[§ 7.] **(2) Ownership an Aid in Interpretation.**—A consideration of the realty owned by a grantor at the time a conveyance is made, may give meaning to an otherwise indefinite description, or limit a description permitting two interpretations. A deed describing property as "a house and lot on Amity Street, Lynn, Mass." is not void for uncertainty where the grantor owned only one house and lot on that street.[13] Where the description in a deed is equally applicable to two tracts of land, one only of which the grantor owns, it will be presumed that he intends to convey

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[12]Bain v. Tye, 160 Ky. 408, 169 S. W. 843.

[13]Hurley v. Brown, 98 Mass. 545, 96 Am. Dec. 671. See Conflict of Elements.

the tract to which he has title.[14] Thus in Derham v. Hill,[15] the point of beginning was in question. It could have been taken on either side of a twenty-foot alley, and the survey made to include or exclude the alley. The fact that the grantor did not have title to the alley determined the correct location, for it was assumed that he would not attempt to put the grantee in peaceful possession of land he did not own, and therefore could not convey.

A striking example of how ownership may aid in preventing a deed from being void for uncertainty is found in a conveyance which described the property as "lots 7 and 8 Coves Addition," such addition containing twelve blocks of sixteen lots each numbered one to sixteen. The fact that the grantor owned only two lots in the whole addition made this description certain by limitation and thus rendered the deed valid.[16]

[§ 8.] (3) **Reference to Other Instruments.—(a) General.**—By proper reference to another instrument which contains a description of the property conveyed, the latter instrument may in many cases be incorporated in the former, and the two may be construed together for the purpose of identifying the property conveyed by the deed.[17] This rule has been affirmed in cases of reference to a recorded deed,[18] a mortgage,[19] a recorded judgment,[20] tax assessment roll or in general a public record,[21] records in office of Probate Court,[22] wills,[23] records of General Land Office,[24]

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[14]Derham v. Hill, 57 Colo. 345, 142 Pac. 181.

[15]57 Colo. 345, 142 Pac. 181.

[16]Wetzler v. Nichols, 53 Wash. 285, 101 Pac. 867, 132 Am. St. 1075.

[17]German Mut. Ins. Co. v. Grim, 32 Ind. 249, 2 Am. Rep. 341.

[18]Kimbell v. Powell, 57 Tex. Civ. App. 57, 121 S. W. 541.

[19]Perry v. Buswell, 113 Maine 399, 94 Atl. 483.

[20]Kimbell v. Powell, 57 Tex. Civ. App. 57, 121 S. W. 541.

[21]Bagley v. Block, 83 Ore. 607, 163 Pac. 425.

[22]Pingry v. Watkins, 17 Vt. 377.

[23]Morehead v. Hall, 126 N. Car. 213, 35 S. E. 428.

[24]McDougal v. Conn (Tex. Civ. App.), 195 S. W. 627.

government patent,[25] Spanish Concession,[26] vote,[27] and an unrecorded deed,[28] but reference to the latter, although possibly sufficient between the parties to the transaction, can not be held as sufficient against subsequent purchasers without notice, or against creditors.[29]

Reference to another deed for a particular description is regarded as a general description within the meaning of the rules,[30] and a description which is clear and complete will not be limited by reference to another deed.[31]

[§ 9.] **(b) Effect.—(1) Extension of Grant.** — An owner of a homestead farm situated in towns of E and G gave a mortgage thereon, describing it as lying partly in each town, and thereafter gave a deed of all his title and interest to certain real estate situated in the town of E "being my homestead place and the same real estate described in a mortgage—to which mortgage reference may be had for a full and particular description." It was held that reference to the land as his homestead farm and reference to the description in the mortgage together made it reasonably certain the whole farm and not merely that part in E was intended to be conveyed.[32]

[§ 10.] **(2) Limitation of Grant.**—A reference to another deed may restrict the land conveyed.[33] There can be no doubt in the following. "All of blocks 10 and 11 (in the same addition) intended to convey *only* those lots in said blocks 10 and 11 which have been quitclaimed to parties of the first part, or either of them, by conveyance of tax titles." It clearly excludes all properties in said block ac-

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[25]Hensley v. Burt &c. Lbr. Co., 132 Ky. 112, 116 S. W. 316.

[26]Harrison v. Page, 16 Mo. 182.

[27]Goff v. Rehoboth, 12 Metc. (53 Mass.) 26.

[28]Smathers v. Jennings, 170 N. Car. 601, 87 S. E. 534.

[29]Kobbe v. Harriman Land Co., 139 Tenn. 251, 201 S. W. 762.

[30]Huntley v. Houghton, 85 Vt. 200, 81 Atl. 452.

[31]Gaddes v. Pawtucket Inst. for Sav., 33 R. I. 177, 80 Atl. 415, Ann. Cas. 1913B, 407.

[32]Perry v. Buswell, 113 Maine 399, 94 Atl. 483.

[33]Witt v. St. Paul &c. R. Co., 38 Minn. 122, 35 N. W. 862.

quired by any other means and would therefore act to restrict.

[§ 11.] (3) **Reference for Source of Title Only.**—It should be borne in mind that reference to another deed does not necessarily make the boundaries named in that deed the boundaries of the lot named in the first deed. The language may show that reference was made only for source of title, or to identify the lot and not as a statement of boundaries. A particular description in the referring deed will in such cases prevail.[34]

[§ 12.] (4) **Reference Erroneous.**—A general clause erroneously referring the title of the interests passed in the granting clause to a particular source will not serve to restrict.[35]

Thus a deed "all my farm situated in Saugus—also six acres of woodland bounded—(metes and bounds completely given) being the same farm whereof T. Mansfield of Lynn died seised, and which the heirs of said Thomas Mansfield conveyed to me by two deeds reference being had thereunto" conveyed the woodland although it was acquired not from the heirs of Thomas Mansfield but from one Joseph Sweetser. It seems self-evident that this ruling expresses the intent of the deed, for the woodland is described in detail, and it is easily understood how the mistake in the reference was inadvertently made.

[§ 13.] (F) **Reference to Plats.**—(1) **General.**—To make a map part of a deed, definite, certain and positive reference must be made to it, and the numbering of lots without reference to a particular map will not suffice.[36] A map, plan or survey referred to in a deed becomes a part of

[34]Perry v. Buswell, 113 Maine 399, 94 Atl. 483; Peasley v. Drisko, 102 Maine 17, 65 Atl. 24.

[35]Winn v. Cabot, 18 Pick. (35 Mass.) 553.

[36]Thrasher v. Royster, 187 Ala. 350, 65 So. 796.

the latter instrument and is to be construed therewith;[37] and courses and distances or other particulars which appear on such maps, plan or survey are to be considered as a true description, for by referring to a map the grantor adopts it.[38] The map referred to need not be recorded.[39]

[§ 14.] (2) **Effect of Unconformity of Plat to Statutes.**—When in a description reference is made to a plat, it may be used to identify the lands referred to, though it does not conform to the statutes and is not duly certified;[40] and when a plat is so defective as not to be entitled to record, but according to which deeds have been executed for years, it is admissible as an instrument referred to.[41] In case of ambiguity as to which one of two plats is referred to in a description, the courts will take into consideration the circumstances attending the transaction, the situation of the parties, and the state of the thing granted,[42] and it will be presumed that a purchase of land according to a plat refers to a plat legally existing at the time of the deed, and the purchaser of lots according to a plat has the right to maintain that he purchased according to such a plat.[43]

Where there is reference in a deed to a plat, parol evidence may be received to identify the map or plat referred to, notwithstanding that it may not be attached to the conveyance or may not be filed;[44] and where the map is inaccurate property may be identified by parol evidence.[45]

[§ 15.] (G) **Repugnancy.—(1) General.**—Particular descriptions usually exhibit more thought and care in their

[37]Brainin v. New York, N. H. &c. R. Co., 136 App. Div. 393, 120 N. Y. S. 1093.

[38]Spencer v. Levy (Tex. Civ. App.), 173 S. W. 550.

[39]King v. Lane (Tex. Civ. App.), 186 S. W. 392.

[40]Sanborn v. Mueller, 38 Minn. 27, 35 N. W. 666.

[41]Pere Marquette R. Co. v. Graham, 150 Mich. 219, 114 N. W. 58.

[42]Cook v. Hensler, 57 Wash. 392, 107 Pac. 178.

[43]Cook v. Hensler, 57 Wash. 392, 107 Pac. 178.

[44]Thrasher v. Royster, 187 Ala. 350, 65 So. 796.

[45]Cleveland v. Choate, 77 Cal. 73, 18 Pac. 875.

framing than general descriptions, and hence as a general rule when the comprehensive words in a deed description of the land granted are followed by a particular or specific description, the general description will be restrained by the particular.[46] While the reference to a former deed may be in the nature of a particular description, it is what the law terms a general description.[47] Modern decisions place little or no stress on the relative positions of the descriptions,[48] and this rule, as are all others, is subservient to ascertaining the intention of the parties. A good general clause will not be limited by a subsequent particular description unless an intention definitely appears from the terms of the particular description to limit the general grant.[49] Furthermore, where a deed contains two descriptions of the land conveyed, one of which, when applied to the land owned by the grantor, is found not true, it must be rejected.[50] This would hold whether it be the general or particular description which is in error. Thus where the general description conveyed all land, buildings and appurtenances used in the turpentine business, and the particular description omitted one parcel included, the general description prevailed because it showed the intention of the parties.[51]

[§ 16.] (2) **Rejection of the False.**—All the calls of a deed should stand if possible, and that construction should be adopted which will allow this to be done,[52] for every part ought, if feasible, to take effect and be operative.[53] Where inconsistent, preference will be given to that most likely to

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[46]State v. Thompson, 77 W. Va. 765, 88 S. E. 381.

[47]Huntley v. Houghton, 85 Vt. 200, 81 Atl. 452.

[48]Quelch v. Futch, 172 N. Car. 316, 90 S. E. 259.

[49]Barksdale v. Barksdale, 92 Miss. 166, 45 So. 615.

[50]Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691.

[51]Peninsular Naval Stores Co. v. Tomlinson, 244 Fed. 598.

[52]Bourn v. Robinson, 49 Tex. Civ. App. 157, 107 S. W. 873.

[53]Columbia City Land Co. v. Ruhl, 70 Ore. 246, 134 Pac. 1035, 141 Pac. 208.

express the intention and least liable to error,[54] for the courts will look into the surrounding facts and adopt that description which is most certain and definite[55] and will carry out the intent of the parties.[56] In a conveyance deed if there are certain particulars once positively ascertained which designate the thing to be granted, the addition of a circumstance false or mistaken, clearly appearing to be made through error, does not render the conveyance void, for the identity of the land is ascertained from the entire description; and when a description is part true and part false it will take effect if, after the rejection of the false, sufficient remains to ascertain its application.[57] Thus where a deed description calls for a line running northwesterly parallel to a street which bears northeast, the call parallel to the street is to be obeyed as being both more certain and less liable to error.[58] Furthermore, where the word "north" in a description is clearly shown by context to be a clerical error for the word "south," it will be so read.[59]

The courts will reject false descriptions regardless of position. Where a lot in the general description was designated correctly by lot and block numbers as at the corner of T and H streets, but in the particular description by metes and bounds was located at T and I where the grantor did not own property, it was held that the false description could be rejected since what remained was sufficiently definite without it, and since the false description, considered as an essential part, would have made the deed confused and inoperative.[60] Likewise where the description clearly identified and located a certain lot in Block 56, and there

[54]Sandretto v. Wahlsten, 124 Minn. 331, 144 N. W. 1089.

[55]Pardee v. Johnston, 70 W. Va. 347, 74 S. E. 721.

[56]Howard v. Cornett, 151 Ky. 125, 151 S. W. 370. See also §§ 65, 66.

[57]Derham v. Hill, 57 Colo. 345, 142 Pac. 181; Brose v. Boise City R. & Term. Co., 5 Idaho 694, 51 Pac. 753.

[58]Maryland Const. Co. v. Kuper, 90 Md. 529, 45 Atl. 197.

[59]Whitaker v. Poston, 120 Tenn. 207, 110 S. W. 1019.

[60]State Sav. Bank v. Stewart, 93 Va. 447, 25 S. E. 543.

was an erroneous call for Block 156, it was held proper to disregard the latter call.[61]

The clue to an intention may be found in a reservation. Thus a general description of a property described it as the H farm, and the particular description by metes and bounds included only a portion of it and omitted a tract of some twenty acres where there was located a graveyard which was reserved. If this particular description prevailed, the reservation was needless. Hence it was ruled that the general description expressed the intention of the parties because it gave effect to all the clauses.[62]

[§ 17.] (3) **Limitations.**—In the above it has been established that rejections can be made only to render the intention of the parties and the identity of the land more certain, and where the rule fails in this it can not be applied.[63] It has been further held that an error in a deed description can not be disregarded unless there is sufficient left in the description, not only to plainly indicate the property intended, but also to show that there is an error that can be disregarded, and the property still be clearly identified.[64]

While the courts may correct an error so as to make the calls of a deed consistent with each other, and the description perfect, they can not include in the description land which the calls fairly construed do not include. In the case of Richardson v. Watts[65] a particular description describing land by metes and bounds began at a certain well, and the last course ran S 87°W to point of beginning without stating the distance. When run out the closing line cut the first course some two rods north of the well, and in

[61]Williams v. State, 52 Tex. Cr. 371, 107 S. W. 1121.

[62]Howard V. Cornett, 151 Ky. 125, 151 S. W. 370.

[63]United States v. Cameron, 3 Ariz. 100, 21 Pac. 177.

[64]Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527.

[65]Richardson v. Watts, 94 Maine 476, 48 Atl. 180.

correcting the error so as to make the traverse close rather than change the direction of the last course, the court lengthened the eastern boundary, which was nearly parallel to the western, the proper distance, because of the

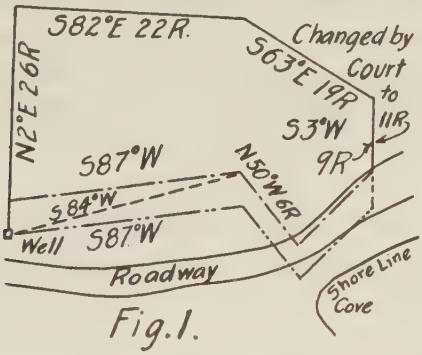


Fig. 1.

greater possibility of error in chaining, especially on account of the roughness of the ground at that point. It refused, however, to extend this line to the cove because such action would include land which could not fairly be construed as within the intent of the parties.

[§ 18.] **(H) Deed Descriptions as the Basic Data of a Survey.—(1) General.**—An engineer is not concerned with matters of title but only with questions of boundary, and from the standpoint of surveying the description is the most essential portion of the deed. It is a writing of great dignity which the engineer respects, regardless of whether it detracts or adds to the holdings of his client. His one aim in making the survey is to follow the instructions therein given, so that the lines run will be placed upon the ground where the parties to the transaction intended them to be as set forth by the grantor's words in the conveyance, for it is to be presumed that in accepting the deed the grantee acquiesced in the description. With this in mind it is interesting to note the various types of descriptions encountered in the routine of work.

[§ 19.] (2) Types of Descriptions.—(a) General.—In the older eastern cities where lots and blocks are irregular in shape and size, and the city map, because of the unsettled state of private boundaries, shows only the street lines and angles, the descriptions encountered in a survey fall into five classes. The first, in which the conveyance calls for the lot by number and by reference to the plan of subdivision, is distinct from the remaining types and will be considered at length in section 35. The remaining classes are

(a) Those which contain no quantitative data;

(b) Those which contain quantitative data given in such form as to be worthless, or obviously incorrect;

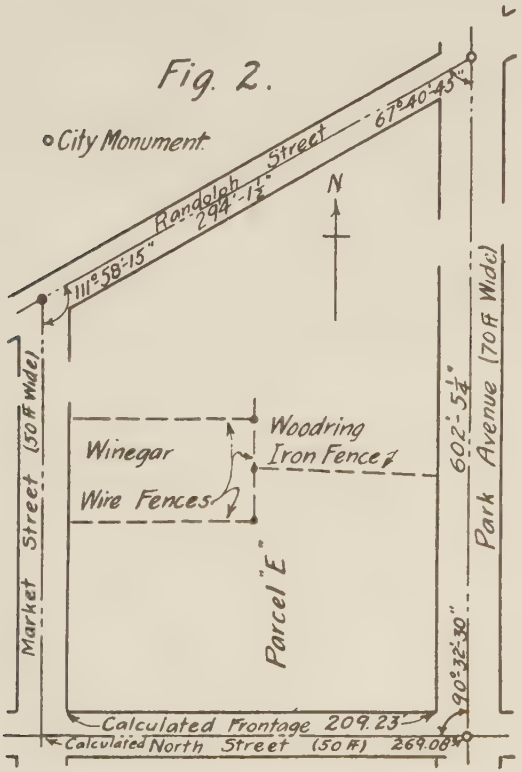
(c) Those which contain the most essential quantitative data and necessitate only reasonable assumptions to make them mathematically certain;

(d) Those which are mathematically complete.

It is interesting to note that examples of all these types may be found within an area of about half an acre lying at one end of a city block as shown in the sketch. The survey involved the only lot on the north side of North Street between Market Street and Park Avenue designated as Parcel "E." The sketch shows all the land marks which actually existed at the time of the survey. The deed descriptions are not fictitious, and it is suggested that after the reading of each an attempt be made to lay down the boundaries therein described upon the sketch.

[§ 20.] (b) Descriptions Containing No Quantitative Data.—Parcel "E," the only lot facing on North Street, is described as follows: "Bounded on the south by North Street, east by land formerly owned by Dr. Williams, north land of Woodring, fifty feet more or less, and west Grove Winegar and Hannah." Prior deeds in the chain are by

adjoiners without any distance calls whatever and give no further information. The fences indicated are the only evidences of boundaries. Although calls for the lines of



adjoiners are given considerable weight in many jurisdictions, the engineer in running the lines of a survey appreciates that they are not a practical aid but a "mere fiction."[66]

Under the circumstances there is nothing to do but look for the bounds of the Williams, Woodring, Winegar, and Hannah properties, for the lot in question is clearly a rem-

[66]See § 180.

nant, covering whatever may be left after other conveyances are satisfied. The Williams deed calls for a lot about sixty (60) feet on North Street and about ninety-four (94) feet on Park Avenue. The adjoiners are given, that on the north being Rebecca Story. Her lot is found to be between Williams and Woodring, and therefore must abut parcel "E" on the east, but no mention is made of the fact in the deed. This is not startling, for a scrivener so careless, ignorant and indifferent as the writer of these deeds would not worry about such a trifle.

The situation now reveals how weak a call for an adjoiner may be. There are no landmarks, and the adjoiner's deed calls for the line sixty (60) feet more or less from Park Avenue. Searching back along the chain into Williams adds nothing but confusion, for it is learned that the frontage on Park Avenue was earlier given as ninety (90) feet more or less. However, this deed is over thirty-five years old, and doubtless there have been conveyances out during that period. Searching forward we find a conveyance out of Mary E. Williams to Julia Dunn which is of interest because it illustrates the second general type.

[§ 21.] (c) **Descriptions Containing Worthless Data.** —The Dunn lot is described as follows: "Beginning at a point on the west side of Park Avenue at southeast corner of Story Heirs, being the northeast corner of lot hereby conveyed, thence southerly along Park Avenue thirty (30) feet, thence westerly by right angles with Park Avenue along other land of first party to a point two (2) feet west of place where a lattice now stands, thence north along a line two feet west of said lattice and parallel therewith and parallel with Park Avenue thirteen (13) feet to a point; thence westerly at right angles with Park Avenue to line of Porter's lot (Parcel 'E'), thence north along said Porter's lot to Story's lot, thence eastwardly to Park Avenue."

In passing it is interesting to note how unsatisfactory this last description is. The south side of the Story property is another unmarked line, and therefore the point of beginning is dependent upon another deed. But perhaps the most amusing call is that for the second course which is of unknown length but stops at "a point two (2) feet west of place where lattice now stands," date eighteen years prior to survey. All landmarks are noted on the sketch, and the reader is left to find the lattice. In bargaining it was proper to fix the corner with respect to the lattice, but when the description was written it should have been tied to the west line of Park Avenue. This description furnishes no data, and it is necessary to refer to the next deed out of Mary Williams which chances to fall in the third class.

[§ 22.] **(d) Deeds Containing Quantitative Data Necessitating Only Reasonable Presumptions.**—James Swickard acquired the balance of the Williams land thirteen years prior to the survey by a conveyance which reads as follows: "Bounded on the north sixty-three feet by land of Julia Dunn, east sixty-one feet by Park Avenue, south sixty-three feet by North Street, west sixty-one feet by land of Peter Eiler (Parcel 'E') together with a strip of land at northwest corner, said strip thirteen feet more or less north and south by seventeen feet more or less east and west." He immediately conveyed the piece thirteen by seventeen (13x17) feet more or less to Julia Dunn, making her lot of uniform width. This now establishes the east line of Parcel "E" as sixty-three feet from Park Avenue and infers that it is parallel thereto. In fact, according to the description, the lot is a parallelogram with the north side along the Dunn property parallel to North Street. But the south line of the Dunn property is at right angles to Park Avenue, and Park Avenue and North Street form an angle

90°-32′-30″ measured in the northwest quadrant. Mrs. Williams' attorney did not compare his description with that in the deed to Julia Dunn five years previous and left a triangle having no frontage on Park Avenue, a depth of approximately forty-six feet and a base at the rear of about one-half foot unaccounted for. This inconsistency is apparent in the office without recourse to the field.

This deed serves to tie both the Dunn and Eiler (Parcel "E") deeds to the corner of Park Avenue and North Street, but as there is no authority for the depth of sixty-three feet it is well to see what regard has been given to it in other conveyances. The description in the first deed out of Swickard eleven years prior to the survey is sufficiently definite to warrant classification as one of the fourth type, although better examples might be found.

[§ 23.] (e) **Deeds Containing Complete Data.**—Swickard conveyed the corner lot to Andrew Miller as follows: "Commencing at the intersection of the north line of North Street and the west line of Park Avenue, thence north along Park Avenue nineteen (19) feet nine (9) inches, thence west parallel to North Street sixty-three (63) feet to lot of Peter Eiler (E), thence south nineteen (19) feet nine (9) inches to North street, thence east along North Street sixty-three (63) feet to point of beginning." This deed is definite and requires no reference to others to lay the grant upon the ground. The north line is parallel to North Street and therefore the depth of the lot measured perpendicular to Park Avenue is a slight fraction of an inch less than sixty-three feet.

Credit for this admirable description may properly be given to Mr. Miller's attorney, for approximately four months later we find a conveyance out of Swickard to Linda and Anna Bowen for the balance to the north of Miller bounded and described as follows: "north Julia Dunn, east

Park Avenue forty (40) feet three (3) inches more or less, south Miller and west Peter Eiler, having a depth of sixty-one (61) feet more or less." This is a new depth added to the collection, so perhaps it is advisable to see what has occurred in the Julia Dunn property which it is found has changed hands several times, and four years prior to the survey was acquired by Frank L. Hotchkiss by a deed giving the adjoiners and stating that the property is about thirty feet wide on Park Avenue and about sixty feet deep.

The Rebecca Story deed calls for adjoiners and describes the lot as twenty-five feet by sixty feet. The south line of the adjoiner on the north (Woodring) is marked by an iron fence which makes a decided angle with Park Avenue. The description infers that the south line is parallel thereto, but evidently there was some confusion in this regard, for shortly after Rebecca Story took possession she acquired from Mrs. Williams a triangle to the south having no frontage on Park Avenue and a base of thirty-four (34) inches along Peter Eiler's land.

All this leads to the conclusion that the east line of Parcel "E" begins at a point on the north side of North Street sixty-three (63) feet west of the intersection of the north line of North Street with the west line of Park Avenue and runs in a northerly direction parallel with Park Avenue. This is by no means convincing for sixty-three (63) feet is five per cent. more than sixty (60) feet, and in the conveyancing of city properties quantity can not be regarded lightly, especially when the lot is shallow. It is accepted because it is definite and can be measured twice the same. By a similar search the west line is established beginning at a point on the north side of North Street one hundred (100) feet east of the intersection of north line of North Street with the east line of Market Street, and running northerly parallel to Market Street. The north line is marked by the Woodring fence which has long stood as a

monument. This is fortunate for quantitative data regarding its direction is not readily available.

[§ 24.] (J) **Deed Descriptions Lacking Quantitative Data are Worthless.**—It is evident from consideration of this survey that

(1) The deed to the property gave no clue to its dimensions or exact location;

(2) Quantitative data were absolutely necessary to locate the grant and of necessity had to be obtained from other deeds;

(3) The calls for adjoiners weakened the grant, for it is not beyond the realm of possibility that at some time in the past the frontages on North Street, were approximately sixty (60), forty-nine (49), and one hundred (100) feet, and had a definite measurement been given on North Street the sixty feet more or less would never have grown to sixty-three feet;

(4) The necessary preparatory work was unduly involved and therefore increased the cost of the survey;

(5) The public is paying for the filing and keeping in steel cases in fire resisting rooms records which merely give an individual clear title to a potential boundary dispute, and contain no data of public value beyond the mere record of ownership.

[§ 25.] (K) **Mathematics Essential in Writing of Deed Descriptions.**—Some two thousand years or more before Christ the ancient Egyptians learned that stones at property corners were a poor control for a system of land surveys along the Nile where the flooding of the banks washed out the monuments. They developed a science known as geometry, the name of which is derived from the Greek "geo," earth, and "metron," measure. It is not one

of the higher branches of mathematics and is, in fact, taught in the American high schools. However, in many sections of the country the beauty of the simple propositions propounded by Euclid has dimmed the practical utility which gave geometry birth. Another kindred branch of mathematics which is of some use in land surveying is trigonometry. This too is of great antiquity. It is interesting to investigate the practical application of geometry and trigonometry to the particular lot being considered. For this purpose only the data which are on record in the county court house and the city engineer's office will be used. This was available to the writer of the deed description without recourse to a survey. The description is not given as a model, but merely as one utilizing no data except those available at the time of the last conveyance of parcel in question.

Beginning at a point on the north line of North Street one hundred (100) feet east of the intersection of the north line of North Street with the east line of Market street, thence east along the north line of North Street forty-six and twenty-three one hundredths (46.23) feet to a point sixty-three (63) feet west of the intersection of the north line of North Street with the west line of Park Avenue as measured along the north line of North Street, thence northerly in a line parallel to Park Avenue to the south line of Woodring as marked by an iron fence, thence along south line of Woodring to a point in the east line of Clara Winegar, thence south along the line of Clara Winegar and H. R. McGranahan (Hannah) parallel to Market Street to the point of beginning.

III. METHODS OF CONTROLLING BOUNDARIES.

[§ 26.] (A) General.—Boundary control is a problem as old as the possession of real property by freeholders and exists because land can not be segregated and placed under

lock and key. The deed serves well as a muniment of title, but the description contained therein fails as a complete protection to the boundaries because it merely describes what they are and how they are to be determined without physically locating and marking them. Therefore, while it functions perfectly in describing the boundaries, it leaves the major problem of the actual location untouched.

The overflowing of the Nile convinced the Egyptians of the futility of private monuments, and the necessity of referencing such marks to an acknowledged base above the flood level early led to the development of the only method whereby boundary lines may be stabilized. During the centuries that have since elapsed, monuments have not acquired immunity from destruction, and the problem of control has in principle remained unchanged, except that modern conditions require that boundaries be more definitely defined and more accurately located, and that proper regard be given to the relation between the lines of one property and those of another.

[§ 27.] **(B) The Legal Method.—(1) Foundation.**— Unless the engineer considers the background of legal thought and practice he can not properly evaluate the contribution of the profession. Law covers the entire field of human activities from the intimate relations of the family to the dealings of the largest corporations, and in the legal encyclopediae are included the ramifications of all professions. It therefore can not carefully differentiate and give weight to details, but must depend upon the application of general principles already established and functioning well for the usual situation. The courts must be consistent and seek precedent for their decisions, for otherwise men in their dealings with one another could not anticipate the consequences of their actions. This naturally keeps the law a trifle behind progress, and the prodigious develop-

ment of the mechanical arts and business activities has made this inevitable lag annoying because it has placed upon the profession the burden of establishing new law and thus denied it an opportunity to revise the old to meet new conditions.[66a]

Furthermore the courts are interpretative rather than creative institutions, for law is a system of rules or regulations recognized by men and nations as governing their intercourse, and the court functions merely to interpret what society has decreed formally or informally as right, proper and just when controversy arises. Constructive work is primarily an individual matter, and progress comes from personal effort rather than group action, which at the best represents only average achievement. Therefore the jurist's decision, although it may reflect a broad consideration of the general problem that a particular case brings to its attention, reflects the accepted practice of the mass rather than the more advanced accomplishment of the leader or expert.

[§ 28.] (2) **Characteristics and Limitations.**—In this setting and amid the controversy of individual cases the courts have made their contribution to the problem of boundary control, which is admittedly limited to the definition of what constitutes the boundaries. The rules which they have established are, for the most part, of great antiquity and are based upon land values, surveying methods, and the life of former generations. Their purpose is to construe the expressions commonly found in deed descriptions in keeping with the laymen's understanding and use rather than in conformity with their strict technical meaning, so that the ignorance of the scrivener will not overcome the intention of the parties to a transaction. This has been accomplished admirably, and the rules are of inestimable

[66a] The Maze of the Law, R. W. Child, Sat. Eve. Post, March 1, 1930; Mr. Justice Holmes, H. J. Laski, Harpers, March, 1930.

value for the interpretation of old deeds; and although for the most part they merely raise presumptions that may be rebutted, they unfortunately have made the acceptable practice of the past the criterion of today. The great objection to them, however, arises from the fact that the elements used to define boundaries necessarily locate them, and therefore it is impossible to segregate the problem into two propositions, such as the separate consideration of what the boundaries are and where they are located, and to solve the one without regard to its relation to the other.

When this is admitted, and the impossibility of an expression having two meanings simultaneously conceded, the layman's loose use of dimensions precludes the engineer's effective application of quantitative data. And as the control of boundaries is essentially a problem involving the practical application of mathematics, rules which do not recognize the strict mathematical significance of dimensions prohibit a general and broad solution.

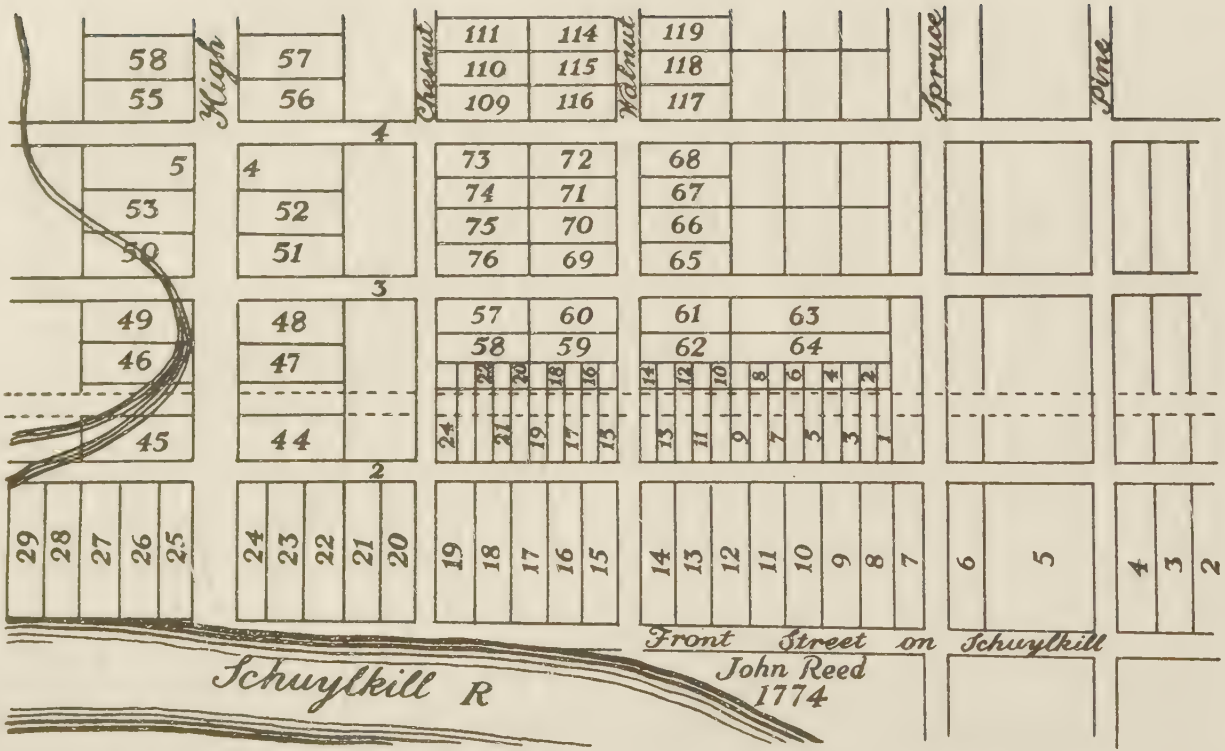
[§ 29.] (C) **The Engineering Method.—(1) Development.**—The rectangular system of surveying as applied to the division of public lands into townships and sections is, because of its intimate relation to the boundaries, the best known and most appreciated contribution of the engineer. It was adopted by Congress by ordinance of May 20, 1785, to provide for an accurate survey by which descriptive data could be secured for the identification on the record, and on the ground, of the tracts sold and conveyed from the public domain. This act merely provided for the survey of six mile squares called townships with the boundaries bearing due north, south, east, and west.[67] There was no provision for primary control except that Ellicott's line between Pennsylvania and Ohio should serve as the initial reference line. General Rufus Putnam, appointed by President Wash-

[67]Public Land System of the United States, Dept. of Interior, Gen. Land Office, 1924, S. V. Proudfit, F. M. Johnson.

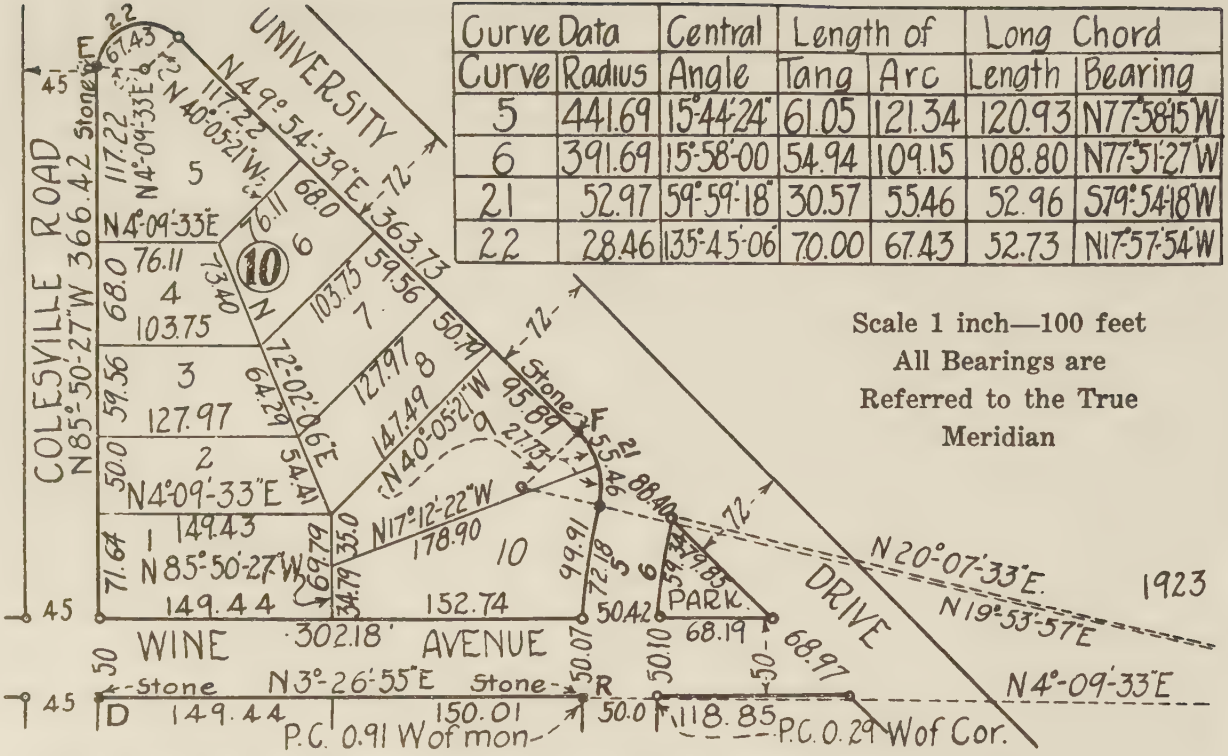
ington in 1796 to the newly-created office of Surveyor General, probably is rightly credited with the numbering system now in use for designating the "sections," the running of the same upon the ground, the throwing of the excess or deficiency of measurements on the north and west exterior boundaries, and of first using bearing trees as corner accessories. But to his successor, Jared Mansfield, belongs the credit of first introducing a system of scientific control to prevent the inevitable outcome of the further expansion of surveys without proper coordination. His great contribution was the introduction of a primary control in the form of base lines and principal meridians forming a framework for the laying down of townships and the prevention of cumulative error.

Edward Tiffin, the first commissioner of the General Land Office created in 1812 and later Surveyor General of the Northwest Territory, realized that as yet proper regard had not been given to the convergency of the meridians, and in 1824 perfected the control by adding to it a scheme of guide meridians and standard parallels. Since then numerous refinements in practice and improvements of far-reaching importance have been made to keep the system abreast with the demands of the day, particularly the act of 1910 abolishing contract surveys and providing for the employment of competent surveyors by the Secretary of the Interior; but in principle it has remained unchanged, and the experience of over one hundred years has proved it to be the most thorough and effective system of land identification ever devised by man.

However, the rectangular system of surveying as applied to the public lands of the United States is not suitable for the control of city lots. Accuracy is relative, and an accuracy sufficient for townships and sections covering land worth less per acre than a city lot is worth per front foot, will not meet the requirements of cadastral surveying. A



The plats of 1800 could be scaled with an accuracy comparable with the field instruments of the day, and land values did not encourage the development of surveying or the application of the law.



Curve Data		Central	Length of		Long Chord	
Curve	Radius	Angle	Tang	Arc	Length	Bearing
5	441.69	15°-44'-24"	61.05	121.34	120.93	N77°-58'-15"W
6	391.69	15°-58'-00	54.94	109.15	108.80	N77°-51'-27"W
21	52.97	59°-59'-18"	30.57	55.46	52.96	S79°-54'-18"W
22	28.46	135°-45'-06"	70.00	67.43	52.73	N17°-57'-54"W

The modern plat must be completely dimensioned if the precision of modern instruments is to be maintained, and deed descriptions should contain the same detailed data.

precision better than twelve and one-half links[68] per mile of perimeter is necessary within the limits of a town, and in city planning topography must be considered, and beauty demands departure from rectangular blocks. But the departure of the streets from the cardinal directions of the compass or from straight lines does not necessitate the abandonment of coordinates. A convenient monument, possibly one tied to a superior control such as that of the United States Coast and Geodetic Survey, may be taken as the origin, and all other monuments wherever they are, may be referred to the initial stone by their coordinates along north and south and east and west axes as determined by a survey.

It is true that the survey lines connecting the various monuments are not along rectangular lines, but this is of no consequence, for the projections of each course of a traverse upon the cardinal axes are computed, and thus the essential principle of rectangular surveying is retained. A system of squares with a predetermined origin may be superimposed upon a city plat and all control points accurately set down upon the map regardless of where they fall because of the random value of their coordinates, or now the lines determining the same chance to run.

In the control of the boundaries of city properties accuracy is important, and we are in debt to the United States Coast and Geodetic Survey, the United States Geological Survey, the instrument makers of both America and Europe, and to a score of engineers connected with public and private surveys for the precise instruments and methods of today. The old compass traverse run with a chain reading to links has yielded to one run with a steel tape reading to tenths, hundredths, or thousands of a foot to correspond with the precision of the transit used for the angular ob-

[68] Manual of Instruction for Survey of Public Lands, 1919.

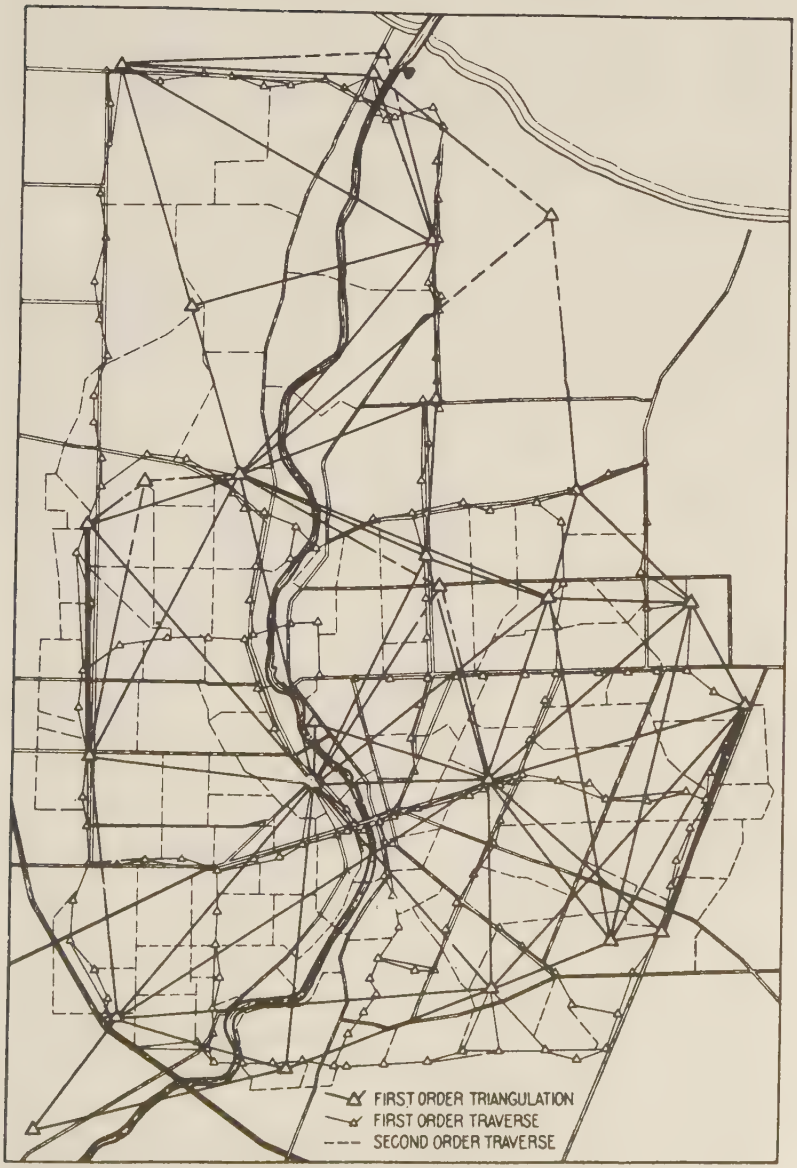


FIG. 3. Courtesy of U. S. C. & G. S., A-313

servations. When the terrain is so rough as to make accuracy difficult, or field work excessively expensive, the engineer may take to the air, and, by the application of trigonometry, linear measurements may be confined to the base lines, chosen where conditions are favorable, and the relative position of remote points can be found primarily by angular observations with sight lines passing over hills, valleys and roof tops.

[§ 30.] (2) **Accuracy.**—It is difficult to describe in general terms the accuracy which can be attained in precise traversing and triangulation. It may be suggested by citing actual results. Base lines may be measured with an Invar tape at an average speed of better than a mile and one quarter per hour with a probable error of 1/2,000,000[69] (less than 1/30 inch per mile) and directions observed under city conditions which are invariably unfavorable, with a probable error of 0.97″ representing an arc of less than 5/16 of an inch at a radius of one mile. The precision of the survey as a whole, subject as it is to the propagation of error, may be maintained as high as 1/50,000 or even 1/100,000 if desired. The Coast and Geodetic Survey when taking off previously established stations and making partial observations on the triangles from which new work is started and closed have found the recalculated lengths of the lines to differ from the previously adjusted and accepted values, based on more extensive observations by less than three-eighths of an inch per statute mile between stations.[70]

[§ 31.] (3) **Elimination of Error.**—The methods followed in establishing a horizontal control system preclude the accumulation of error and provide checks against mistakes or gross inaccuracy. A limited number of selected

[69]United States Coast & Geodetic Survey, Special Publication, § 134, p. 10.

[70]Use of Geodetic Control for City Surveys, United States Coast & Geodetic Survey Special Publication, § 91, p. 47.

points in the outlying districts of the city and at suitable locations within the limits may be used for the primary control. These are made common to several traverses or triangulation nets, and their relative positions fixed precisely by adjusted coordinates. Secondary traverses are run between these utilizing the merestones of selected streets as stations. After these have been carefully checked and adjusted, traverses may be run along the remaining streets tying in with the secondary control, thus linking all the merestones together by a system of coordinates and placing within a few tape lengths of any property a public monument of known location which may be replaced if destroyed.[70a]

[§ 32.] (4) **Application. — (a) Cost.** — As accurate surveying is costly, it should be noted that the control as outlined is the skeleton upon which the engineer builds his map. If he attempted to plat a city by merely assembling the blocks, the minute errors of little consequence within the block would accumulate, and his map would be merely a mosaic which would lose in accuracy as it was extended. Both a horizontal and a vertical control are used in all extended surveys, and when made with sufficient accuracy they may be used for the foundation of cadastral, topographic or other maps. Therefore, although the horizontal control renders an inestimable service in the control of boundaries, its cost is divided among all the uses to which accurate maps are placed and is distributed over long years of usefulness. Furthermore, as a cadastral map is used for the official valuation of land for government purposes such as assessment of taxes, the cost of a controlled survey is invariably offset to some extent by the detection of unassigned areas which in the past have escaped taxation. Ultimately a controlled survey pays for itself, for the cost of

[70a] United States Coast & Geodetic Survey Manual of First Order Triangulation, Serial No. 329, p. 155.

accurate property surveys is materially reduced. Owners pay for the time consumed in searching through worthless deed descriptions, and the possible reduction in this item of the survey will alone greatly reduce the expense.

[§ 33.] (b) **Necessity.**—The automobile, by extending the commuting limits of the city, is encouraging the extension of controlled surveys. The residential zone is being pushed into the suburbs which are developing with a rapidity unknown in the past. Traffic thus created necessitates regional planning, and the coordination of subdivisions so that they form part of a major scheme. To accomplish this the city engineer or the officials in responsible charge of a region must have a horizontal control to which the isolated developments may be referred, so that their relation to the whole may be studied. When two or more stones of a subdivision are carefully tied to stones of the superior control of the region, each stone of the plat is then connected to the master control, and the data of the subdivision survey affords a means of calculating the coordinates of every monument within the survey with regard to the origin of the superior control. The progress of regional planning is affording the engineer an opportunity to coordinate his isolated subdivision surveys with the control system of a nearby city. In fact it is the duty of all officers in charge of regional planning to establish primary control systems, to require that all subdivisions be tied to at least two stations of the same, and to check the tie so that its accuracy is unquestionable.

[§ 34.] (5) **Advantages.**—(a) **General.** — The engineer's method of control of boundaries is the refinement of a system known and used by the Egyptians and the Babylonians, and depends for its strength upon (1) accurate monuments, whose coordinates are computed by a carefully arranged procedure designed to reveal any blunder in field

work or computation, to decrease propagation of error, and to afford a mathematical means of judging the precision of the survey; (2) the relative position of each monument being known with respect to every other monument in the city, thus insuring against the basic control being lost; (3) easily identified monuments of uniform substantial design with proper inscriptions to verify their official establishment; (4) location of monuments within the street (best beneath the sidewalk) where owners in the development of their property have no occasion to disturb them; (5) the application of surveying methods (essentially the closed traverse or triangulation net) commonly known and used by engineers and founded upon mathematical principles which operate to limit the propagation of error and to provide a framework for the proper correlation of all parts of the survey; (6) the test of experience in the control of the Geodetic and Geological Surveys of the United States.

[§ 35.] **(b) Deed Descriptions Rendered Simple.**—A controlled cadastral survey showing the street lines and the public monuments at their intersections, or better on fixed offset lines and indicating the details of all property lines noting the length and true bearing of each, affords the best and most certain means of deed description. The blocks with the dimensions and the bearings of the street lines may be numbered and the lots with their lines fully dimensioned may be assigned subnumbers. Monuments marking the blocks are all controlled by coordinates. Care can be exercised to insure the accuracy of the map, and it may be made a public record. The scrivener may then confidently describe a property by a block and lot number as readily as he may call for a section in the territory covered by the land survey of the United States. When a lot is subdivided, the proper authority in charge of the cadastral work of the city should be advised so that he may make the necessary

survey to show the newly-created lot upon the recorded plat indicated by a subnumber to be used in the conveyancing. If it is conceded that the best expression is the simplest, then it must be admitted that reference by lot and block number to a dimensioned plat of public record, enjoying authority of continued use, is far superior to a written description starting nowhere and running thence by a dozen courses to the point of beginning, especially when written by a person unversed in trigonometry.

A description by block and lot number with reference to an accurate plat gives the engineer the relation of each parcel with respect to all other lots in the block in the most concise and accurate form. It is independent of other deed descriptions and establishes the position of a property with respect to the street lines without further recourse to the records and reduces the possibility of errors to the irreducible minimum.

[§ 36.] (c) **Public Monuments More Enduring Than Private.**—The experience of the Land Office, the Coast and Geodetic Survey, and the Geological Survey proves that the maintenance of monuments under the most favorable conditions is a difficult problem which depends for its solution upon care in construction and protection from disturbance. In cities where monuments set to mark boundaries are usually artificial, the mortality of private monuments is high. Fences which have rotted are often not replaced, stakes decay, and pipes set nearby to more permanently mark the corner are heaved by the frost and ultimately disappear. Building operations and property improvements account for the loss of numerous monuments.[71]

The public monuments of a controlled survey are designed so as to insure a long life and are carefully set at or below grade with base below the frost line as protection

[71] See § 52, infra.

against disturbance. Their usual position outside of the property line prevents loss when properties are improved, and if contemplated construction of sidewalks or pavements threatens their stability, the city engineer directing the work can guard against destruction. These factors, although greatly reducing the loss of public monuments, do not eliminate it entirely, but lost monuments of a controlled survey can be replaced with assurance, whereas lost private monuments often depend for their replacement upon data in dispute, or, at the best, very limited data related usually to but one property.

[§ 37.] (d) **Public Monuments More Certainly Identified.**—When making a survey an engineer must consider both questions of law and of fact, and as the purpose of a survey is to lay down the boundaries and check the same for overlaps and gaps, he naturally gives harmony considerable weight when deciding questions of identity. Private artificial monuments usually lack identifying marks, and when inconsistent with deed dimensions and in conflict with lines and corners of an adjoiner, their significance is doubtful. Thus where a deed calls for a pipe set in the side line of a street without reference to marks identifying the particular pipe referred to, and one party to a dispute claims to a pipe which he asserts is the one referred to and was set by a responsible engineer at the time of the conveyance, but the pipe is in reality at the inner edge of the sidewalk, eighteen inches out in the street, there is reason to question the correctness of his understanding of the situation and of the origin of the existing pipe. Public monuments are standardized, and often bear significant letters and a date, which are recorded on the official plats and which identify the monuments beyond question, and check measurements between such monuments confirm the identification.

[§ 38.] (e) **Public Monuments in Better Harmony Than Private.**—Private monuments are mostly located with regard to points set by private surveys made with regard only to the lines of a particular property and without any attempt to coordinate the particular survey to remote points and lines which are intimately related. It is common experience among engineers that such monuments in a block are seldom if ever in complete harmony and at times are extremely discordant both in alignment and distance.[72] This situation precludes precision and makes the actual location of a survey dependent upon the particular combination of private monuments used as a base. Public monuments of a controlled survey are set independent of individual property lines and in known harmony with one another. A survey tied to the same with the desired precision may be re-run from any two monuments of the control with assurance that the points set are as defined in the instrument giving the location.

[§ 39.] (f) **Horizontal Control Affords Means of Stabilizing and Coordinating Private Monuments.**—Private monuments set at the actual corners of a property are of great significance and of unquestionable value as evidence of the understanding of the property owners. It is possible by referencing them to monuments of a control system to overcome the engineering disadvantages of instability, uncertainty and discord. The assembly of independent surveys of individual properties yields an uncontrolled mosaic, increasing in inaccuracy as extended. The same surveys made independently as before but referred to a common base, a line of the control system, may be compared for conflict and assembled into a map of predetermined precision. Inaccuracy in one private survey is confined to its source and is not propagated through adjacent properties.

[72]See § 39, infra.

Private monuments referenced to superior public monuments of the established control are in themselves a link in the chain of control. This link carries to the boundary lines of the private properties the stability and coordination of the system and affords a means for the detection of discrepancies and errors which can not be detected without control.

In a paper entitled "Notes on a proposed standard survey for Sydney" Mr. T. G. Wilson, Jr. observed, "To my mind the first and most important [function] is that of being a survey of record for land titles, and by a system of permanent marking and establishment of muniments to give a settled and unchangeable basis for the delimitation of boundaries."[73]

Where there is a controlled survey the monuments in new subdivisions may be coordinated when the tie is made to the monuments of the superior control. Thus at a reasonable cost, which may be included in the recording fee, definite steps may be taken to preserve their location before the properties are developed. The opportunity for the inspection of subdivision surveys precludes the engineer from establishment of secret monuments of unrecorded location, a practice followed by a few in an attempt to monopolize the work in a given area.

[§ 40.] (g) Permits Construction of Cadastral Maps. —When property lines are tied into a control system an accurate map giving complete information and showing the relation of the various lots to one another can be readily made. This is unquestionably the most significant and convenient form in which to assemble such information for the use of the public, and is a valuable supplement to the deed records for it assembles all related descriptions into a pic-

[73] Use of Geodetic Control for City Surveys, United States Coast and Geodetic Survey Special Publication, § 91, p. 9, referring to "The Surveyor," Sydney, N. S. W., June 30, 1913.

ture showing the situation. It is true that errors are likely to creep in and that these will not be apparent to the casual observer, but the fact that the survey is controlled will ultimately reveal any discrepancy and assist materially in finding its location. The possibility of error arises from the personal element and can not be overcome, but the methods of controlled surveying reduce its probability. Where new work is involved, the process of incorporation in the cadastral map affords a check for errors in the early history of the subdivision and an opportunity to correct them before possession is taken and lines established. A controlled map presenting an accurate representation of a large area affords the best means of detecting discrepancies.

[§ 41.] **(h) Accuracy Encouraged.**—The courts have noticed that two engineers in making a survey may differ in the location of a property and have attributed this fact to their relative skill and experience, and, in the days of the compass, to the difference in instruments.[74] Engineers are well aware that when making a survey in an uncontrolled area, the location as run out by one man will vary, depending upon what is accepted as "good" when starting. Splitting curbs may not agree with splitting sidewalks and differ materially from a line picked up from the fences which are not in harmony with one another. A survey can be of no higher accuracy than the control, and when the base line floats, the location moves with it.

In an eastern city where property is sufficiently valuable to warrant fighting for a fraction of an inch, the street lines are monumented but not controlled, and there is no data giving the angles formed at street intersections. There is some mortality among monuments everywhere, and this city is no exception. Where merestones are lost, they are re-established by the surveying crews of the city engineer's

[74] Watkins v. King, 118 Fed. 524, 536.

office. In one instance in the downtown section the relocated corner established by a local situation survey varied several inches from the position of the original reclaimed merestone, uncovered during the course of construction. The discrepancy might be due to faulty relocation, but this is not necessarily the reason, for where there is no control such things will occur. The situation is so unsatisfactory that one of the leading local engineers refuses to undertake boundary surveys because of the unsettled condition of the street lines. The state does not regulate the practice of surveying, and the work is being done largely by young inexperienced subordinates in the city engineer's office.

A controlled survey would correct this situation, for then the responsible engineer would have a means of verifying his own work, and could guarantee the lines he establishes. The relocation of lost stones could be checked by anyone, and the accuracy of each survey would be entirely dependent upon the care and skill of the party making it.

[§ 42.] (6) **Disadvantages.—(a) Knowledge of Mathematics Necessary.**—Offsetting these benefits is the disadvantage that in areas where the property is acquired by freeholders according to uncoordinated metes and bounds a knowledge of surveying and mathematics is essential to write a satisfactory deed description and to reference the corners of a property to the controlled public monuments. This is true only during the transitory stage, and as the boundaries become settled a simple, easily comprehended description by lot and block number replaces the courses and distances so confusing and meaningless to the layman, but very essential to the engineer in making an accurate city survey.

[§ 43.] (b) **Adjustment Necessary.**—The technicalities involved in utilizing a controlled survey during the transition period and prior to the completion of the cadas-

tral map, necessitate that the scriveners of deeds be broken of many bad habits and educated in the exact use of quantitative data. Disregard for the significance of quantity is peculiar to real estate.[75] The statutes provide for sealers of weights and measures and prescribe the number of pounds of apples, potatoes, etc., in a bushel. In all merchandising involving quantity whether determined by weight, volume, or length—except real estate—standard units are the fundamental bases of barter. It is one of the inconsistencies of the American people that they seal yardsticks, scales, pumps and measures at the market, but buy land without having it surveyed, often without searching the title. This is explained by the fact that land can not be segregated, and when of little value the advantages of accurate measurements do not justify the cost of the necessary survey. Attempts to ascertain quantitative data at a practical cost have resulted in carelessness in surveying, and it has been observed by the courts that such data are not as reliable as calls establishing the boundaries by reference to visible fixed objects. This belittling of course and distance has been reflected in the writing of deed descriptions and has encouraged the loose use of calls for distance, where they were qualified and controlled by other calls accepted by the courts as superior. Thus we find the scrivener sitting in the office and describing a certain line as beginning at a described point and running along the "north side of Washington Avenue forty (40) feet to the fence of James Sweeney," which is in fact but thirty-seven feet from the described point. When the case reaches the court, it will probably be held that the fence which has stood for fifty-four years controls the call for distance, and that the description clearly expresses the intention at the time of the transaction, for it can not be imagined that

[75]See Control of Quantity, § 201, infra.

the grantor presumed to carry the grant beyond the line of the fence which he had recognized for a long period of years, despite the fact that he represented his frontage as forty feet.

On the other hand it is a cardinal principle that control be given to that which is most certain, and quantitative data in general are exact and precise. The units of measurement are standardized, and the word "forty" has but one meaning, absolute, definite and without shade or modification. The different definitions reduce to identities. It means two times twenty, four times ten, and eight times five, and is never in honorable business transactions three times ten plus seven. This consideration establishes beyond question that there is nothing inherent to quantity in the abstract which precludes giving it great dignity and control.

The weakness of quantitative data lies entirely in its observation, which is admittedly difficult. In the past there has been no control over the practice of surveying, and in approximately one-half of the states anyone may survey and locate property lines regardless of his training and ability. Precision is relative, and the running of city property lines with the accuracy consistent with farm surveying is not satisfactory. This has been a serious offence of the old surveyors of the past generation. Surveying by inexperienced chainmen, real estate dealers, and scriveners of deeds has been a prolific source of error. Measurements taken with a cloth tape from curb lines and sidewalk lines have been incorporated in deed descriptions as beginning at the property line regardless of the fact that the sidewalks are often several feet from the sideline of the street. In the past, surveying has suffered because of the attitude of many engineers[76] who have regarded it merely as a trade requir-

[76] Proceedings American Society of Civil Engineers, April, 1912, Part I, 902.

ing little, if any, training, but today the leaders in all branches of engineering recognize the professional character of the art, accord it the dignity enjoyed by law, and are endeavoring to limit its practice to those who are qualified. These considerations establish that the courts have not erred in their general deductions regarding the accuracy of quantitative data in the crude surveys of farm and tract land, but have often misapplied a sound rule of construction, which merely raises a rebuttable presumption to relieve grantees from the consequences of their erroneous misrepresentations regarding the quantity of their grant. The merchant is not relieved from delivering ten yards of goods as contracted for merely because there are but seven yards remaining in the bolt on his shelf, and there is no reason why a grantor should be relieved from delivering forty feet of land merely because the fence called for in a conveyance is reached at the end of thirty-seven feet.

Quantitative data can at a reasonable cost be ascertained with a precision consistent with the use to which it is put, and the methods of controlled surveying are comparable to those of double entry bookkeeping in that they afford checks to detect errors, and it is conservative to hold that surveying data may be made as reliable as a bank statement, for the methods used in the field and in the office are designed to reveal blunders and limit the propagation of error. Until the scriveners of deeds adjust their conception of the certainty and exactness of quantitative data, a superior control is of no practical value, for the relation of the property corners to the monuments of the control must be ascertained from the deed descriptions, and the present loose use of quantitative calls leaves an open link in the connecting chain.

[§ 44.] **(c) Time Necessary for Complete Control.**— In the older towns where it has been necessary to re-establish streets by ordinance, private boundaries are usually in

confusion and can not be readily referred to coordinated monuments. In many cases it is necessary for the court to decide what are the boundaries, and for this reason there will appear on the cadastral map many properties indicated only in pencil because they are not capable of location. One unsettled property may affect the lines of several on the street, especially where the descriptions are tied together by the use of the corner of an adjoiner as a starting point of the lot conveyed by a deed. Theoretically, unsettled lines could be fixed and agreed upon as the survey progresses; but in general it is better practice to merely provide the control and leave the use of the same to the individual property owners. This will temporarily deny certain property owners the advantages of the control, but in the course of a generation all properties may be coordinated by referencing their lines, as they become settled, to the control system.

[§ 45.] (7) **Legal Foundation for Controlled Surveys.**—Leaders of the legal profession recognize that the rules of construction are merely presumptive and may be rebutted, and have noted that to give effect to the superior rule (that the intention as effectively expressed controls), it is essential to consider the surroundings of the particular case, and to differentiate between country and city properties. As early as 1864 Justice Chase of the United States Supreme Court anticipated the need to distinguish according to the circumstances of the survey and, although the conditions surrounding the case before him did not make it applicable, noted that "where lines are so short as evidently to be susceptible of entire accuracy in their measurement and are defined in such a manner as to indicate an exercise of care in describing the premises, such a description is regarded with great confidence."[77] The ancient decision of Davis v.

[77]Higuera v. United States, 5 Wall. (72 U. S.) 827, 835, 18 L. ed. 469.

Rainsford,[78] and the more modern ones of Pinney v. Winsted,[79] Prichard v. Rebori,[80] Vanderbilt University v. Williams,[80a] recognize this principle and give distance calls control over monuments and lines of adjoiners where the conditions of the survey are such that measurements are easily made and therefore certain and of great significance. In those localities where land values are high there is a decided trend to give quantitative data greater dignity.[81]

The rules of construction do not prohibit the use of discretion, and there is ample precedent to substantiate the differentiation between country and city properties, and to give quantitative data the dignity commensurate with its clarity and certainty and to make calls for course and distance effective means of defining private boundaries and referencing the same to the public monuments of a controlled survey. It is only the best minds that have been able to grasp the problem of boundaries in its entirety, but they have laid down a foundation upon which society may build, and although because of the necessity of cooperative effort, progress is necessarily slow, the rapid increase of land values is hastening the application of mathematical control.

[§ 46.] (8) **Availability.**—Controlled surveys and cadastral maps are available in relatively few cities, but it is encouraging to note that some of the smaller municipalities are now undertaking the same, for this will stabilize the private boundaries before land values become extremely high. In many cities the merestones defining the street lines have been surveyed with sufficient precision to form a practical control for present needs. The data which appears on city maps varies widely. On the true cadastral map the

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[78]17 Mass. 207.

[79]79 Conn. 606, 66 Atl. 337. See § 187.

[80]135 Tenn. 328, 186 S. W. 121.

[80a]152 Tenn. 664, 280 S. W. 689.

[81]See Control of Quantity. §§ 204, 207, infra.

details of all properties are given. Where the survey has been made for the primary purpose of street control, the length and direction of the block lines are all that is given, although in some instances the frontage of the various lots is noted. In some cities the properties tied to the street stones are shown in detail, and those which are floating are merely indicated in pencil.

[§ 47.] (9) **Present Use.**—In some cities controlled surveys and cadastral maps are referred to and utilized in conveying either by a description by lot and block number or by the utilization of the available data to tie a description by course and distance to the lines of the control. In others it is impossible to approximately estimate the extent to which the control is used, but an examination of the records reveals that many scriveners ignore their existence and continue to call for adjoiners and to depend upon private monuments lacking in physical dignity but sometimes strong in presumptive control.

IV. THE WRITING OF DEED DESCRIPTIONS.

[§ 48.] (A) **General.**—From an engineering standpoint a deed description is satisfactory only when a complete and fully dimensioned plat of the lot showing the location with reference to the adjacent streets can be prepared without recourse to the deeds of the abutting properties. This necessitates the location of a point of beginning and the course and distance of each line as well as the description of the monuments to be found and the names of the adjoiners. It is impossible to be concise in giving this information, and attempts at brevity invariably sacrifice certainty. The quantitative data suggest the use of sketches, and these pictorial representations are the most compact and easily interpreted means of description available to the scrivener. Plats should be used both for explanatory purposes and to

confirm the dimensions given in writing and in figures in the written descriptions.

[§ 49.] (B) **Rule for Writing Deed Descriptions.**—The only rule that can be definitely given for the writing of deed descriptions is the converse of that laid down by Judge Sanderson of California for the construction of the same.[82] The scrivener should place himself as nearly as possible in the seats which will be occupied by those who, twenty years hence, attempt to lay down the grant, and, remembering the temporal nature of all material things, describe the land conveyed with such clarity and certainty that the intention as effectively expressed will be as significant to the next generation as it is to the writer.

[§ 50.] (C) **Point of Beginning.—(1) Selection.**—The point of beginning is not more controlling than other designated points of a grant[83] and should be selected primarily because of its certainty of identity and facility of location. In the description of farms it is common to call for a material object such as a stone or a tree at the end of each course, and these are of great value, for it is impossible to have a surplus of monuments or witnesses. Unfortunately there is a decided tendency in the description of city lots to rely entirely upon the point of beginning for location, and the remaining calls merely give the length and possibly, but not always, the direction of the courses. This practice makes the point of beginning of particular importance, and it is not uncommon to find that a survey is impossible because of the uncertainty of the beginning point.

There are situations where at present it is impossible to write a model description, but in which by using forethought the necessary ambiguity may be confined to its source. A certain property located on the western side of Cottage

[82]See Control of Conflicting Elements, § 65, infra.

[83]Combs v. Valentine, 144 Ky. 184, 137 S. W. 1080.

Street extended from Randolph Street on the north to an alley of unknown history on the south. The streets were defined by city ordinances, and the intersection of their center lines marked by a recognized monument, whereas the alley existed only by prescription, and a diligent search of the records revealed no clue as to its width or exact location.

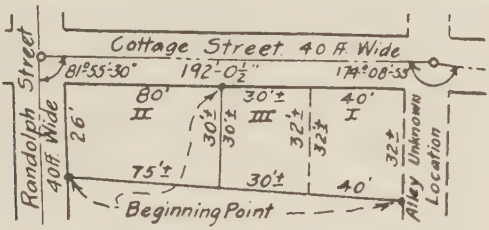


Fig. 4.

The deed of the first parcel out called for its beginning point on the "north side of an alley" and conveyed forty (40) feet frontage on Cottage Street. The second parcel began "at a point on Randolph Street" (south side) and granted eighty (80) feet on Cottage. The alley is indefinite but is approximately one hundred and fifty (150) feet south of Randolph, and as the two frontages deeded out are both definite, a lot facing approximately thirty (30) feet on Cottage Street remained. This was described as "beginning at a point on the west line of Cottage Street eighty (80) feet from the south line of Randolph Street, thence south along west line of said Cottage Street thirty (30) feet more or less to Jennie M. Greenlee's north line," that is the line forty (40) feet north of the unknown alley.

The undetermined location of the beginning point of the first grant causes both its south and north lines to be impossible of location, and the description of the last conveyance depending upon the first for the position of its second course renders a solution hopeless. The parcel adjacent to the alley could not be given a frontage of definite length and location. Therefore it would have been far better to have

fixed its northern terminal and to have confined the ambiguity to the side along the alley. If this lot had been described as "beginning at a point on the west line of Cottage, one hundred and ten (110) feet south of the intersection of the south line of Randolph Street with the west line of Cottage Street, thence south along the west line of Cottage Street forty (40) feet more or less to an alley, thence along the north line of the alley," only one line, namely that along the alley would have been of indefinite location, whereas the starting point used left the grant shifting north and south as a unit depending upon where theory located the alley, and thus unnecessarily left the north line in dispute. The proper starting point would have replaced the uncertainty of location in the first grant by an uncertainty of frontage, thus merely substituting one undesirable element for another equally undesirable, but by so doing would have strengthened the last grant by making it definite.

[§ 51.] (2) **Simplicity Desirable.**—Brevity and simplicity without sacrifice of data are essential in the writing of deeds. As regards a point of beginning, this end is best attained by using a corner on a street line, and the following description is defective partially because of the failure of the scrivener to select the best point at which to start. It reads, "Beginning at the northwest corner of the land of H. C. Davis in the east line of James Kepler seventy (70) feet north of North Street, thence north forty (40) feet to Water Street, thence northeast along Water Street—." The east line of James Kepler is described in the deed into him as "east towing path" of an old canal which has long since been graded and is down in lawn. Water and North Streets make an angle of around sixty degrees, and while the situation warrants the assumption that the distance from North Street (70 feet) is to be measured perpendicularly to the

street line, the call for the first course as north forty feet to Water Street is neither true nor magnetic north, nor perpendicular to the street line. The remaining calls of the

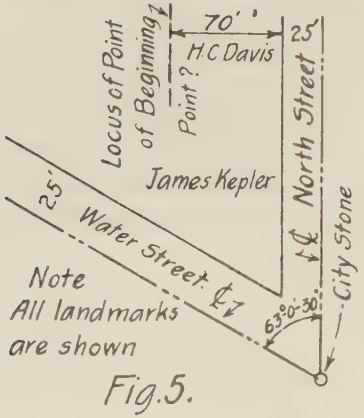


Fig. 5.

deed are for unmarked lines of adjoiners, and while additional quantitative calls are given, the grant is impossible of location. Had the beginning point been selected at the Water Street terminal of the first course it could have been referenced to a city stone at the street intersections, and many elements of uncertainty eliminated.

[§ 52.] (3) **Point Must Be Definite.**—Before a grantee accepts a deed the description should be checked in the field as carefully as the title is searched, and the first element to investigate is the stability of the point of beginning. In the office a description reading "Beginning at a point on the west side of Baldwin Street, thence southerly along Baldwin Street fifty (50) feet to lot of Frank J. Hannaway" may appear acceptable, but in the field it is discovered that the Hannaway property is not fenced or marked, that the lot is one of a dozen or so between two minor alleys of unknown width and location, and a search of the records reveals that the deeds all depend upon each other for location, a prevalence of more or less dimensions, and because of failure to

record a plat of the original subdivision all property lines are tangled. No landmarks exist because no owner can hold to a line long enough to establish them, and exact location by an engineer is impossible. All descriptions which depend for their location upon their adjoiners are unsatisfactory, but mere independence does not guarantee that the position can be found. Thus a beginning point described as "the intersection of towing path and Water Street" rendered a survey impossible because of the filling in and grading of the canal. The interesting feature of this description is that the dimensions are given to the inch, but the towpath must have had some width, and taking the call for Water Street to mean the side of the same, the socalled point is at the best a line possibly three feet or so long with indefinite terminals at the edge of the path.

Nothing is better for marking a point than a stone set with its geometric center at the desired location and a drill hole or mark to indicate the working point. Second to this is an enduring monument very near by to which the point may be referenced. But to utilize private monuments it is essential that they be tied to a superior control, for experience shows that they lack durability and agreement with private monuments of other properties. A historic manor house dating back to Colonial days was marked by a patriotic society with an appropriate stone, and when the property was conveyed it was described as "Beginning at a point on the north line of Randolph Street, said point being directly south of the west side of granite tablet erected by the D. A. R., thence northerly along westerly side of said tablet—to an iron post, thence—to a post five (5) feet east of northeast corner of Byllesby House, thence—." In all, seven courses are described, three monuments called for, and three distances stated, and at the best, recourse to the deeds of surrounding properties would be necessary to lay down the grant. The new owner upon acquisition imme-

diately improved the property by turning the old house so that it faced on Randolph Street and by placing the stone erected by the D. A. R. directly in line with his front door. This destroyed the location of the point of beginning and the tie of the last monument called for. In making the improvements the iron post apparently yielded to a retaining wall, and thus all private monuments called for were lost. There was a street monument in Randolph Street immediately in front of the property, and the beginning point could easily have been referenced to the same, and thus saved.

[§ 53.] (4) **Point of Beginning Should Be Actual and Should Be Referenced.**—A geometric point is without dimensions, and the point of beginning should be as definite and limited in area as is consistent with permanence. This generally necessitates the use of a nail head or other enduring object to mark the point on a monument. The characteristics of the monument should be carefully recorded and for positive identification and replacement in event of destruction, the point of beginning should be referenced to a superior control. The following is an example of a satisfactory point of beginning properly described: Beginning at a point in the east line of Main Street, marked by a cross in a brass screw set approximately in the center of a two-inch pipe filled with concrete, said point being two hundred (200) feet south of the intersection of the east line of Main Street with the south line of Lynn Avenue, and four hundred (400) feet north of the intersection of the east line of Main Street and north line of Elm Avenue.

In writing this description the distance along Main Street between Lynn and Elm Avenues has been verified on the cadastral map and in the field, and the sum of the frontages checks against the block length. If the pipe is removed

when improvements are made, the superior control locates the beginning point.

[§ 54.] (D) **The Boundary Lines.**—(1) **General.**—A description to be ranked as satisfactory must give sufficient data to enable an engineer to check the same for error of closure, that is the length and direction of each line should be given independent of the deeds of the adjoining properties. If this requirement is complied with, the grant will be limited to one size and shape and, with a known point on a line of given direction, will have but one position. It is common for scriveners to omit the directions of lines, and the consequence of this is apparent if the effect upon a four-sided lot is considered. A lot fronting fifty feet and extending back between parallel lines one hundred feet in length is indefinite in depth, for the implication of such a description is that the lot is not a rectangle, and any parallelogram will satisfy the bare description. The triangle is the only figure which can be completely defined in size and shape by linear dimensions alone—all others necessitate the use of angular data.

[§ 55.] (2) **Directions.**—Directions are usually given by bearings, magnetic or true, but in city work the former are utterly useless because of inaccuracy and the presence of local attraction. Where true bearings are used it is the practice to measure the direct angles formed by the bounds and calculate the bearings from that of a single line whose true bearing is known or determined. A superior control is of great value because it gives the true bearings of the street lines from which the survey is started and thus relieves the engineer of determining the true north for each survey that is made. It further insures a common meridian to which all directions are referred and eliminates minute inaccuracies of no consequence in the survey of a single property, but fatal in the assembling of an extended map.

Where bearings are used in deed descriptions, the direct angles between the lines should be noted on a sketch, for otherwise the presence of an error in the transcription of a bearing can not be detected, for the recalculated interior angles will always satisfy the geometric condition that their sum should equal the number of sides less two times two right angles, regardless of the blunder.

When direct angles are used without recourse to bearings, care should be taken that the interior angles of the lot described are used. This pertains more particularly to the first angle from the street line, for it is here that the supplementary angle is most likely to be measured.

[§ 56.] (3) **Distance.**—Length is a more significant quantity to the average man than direction, and hence is less commonly omitted. Unfortunately in many of the older cities little regard is given to exactness in the use of distance calls, and the rules of construction have not discouraged this practice. Even when it is necessary to use a "more or less" dimension, the value given should at least be the most probable, and the description of a frontage of a lot as "not less than forty-five nor more than fifty feet" is inexcusable. When "more or less" dimensions are properly used, the departure from the correct value should not exceed one unit of the last significant digit; that is a dimension of five hundred and seventy-two (572) more or less feet, should imply a length of between five hundred and seventy-one (571) feet and five hundred and seventy-three (573) feet, while a dimension of 572.6 more or less feet should indicate the intended value to be between five hundred seventy-two and five-tenths (572.5) feet and five hundred seventy-two and seven-tenths (572.7) feet.

[§ 57.] (4) **Direction and Distance Must Both Be Given.**—Because boundary lines are vector quantities, it is

essential that both course and distance be given, and where either is omitted:

(1) The boundaries can not be checked for presence or absence of error of closure;

(2) The description will be dependent on deeds of surrounding properties;

(3) The survey will be of less value, because of its dependence upon extraneous deeds and possibly upon theories regarding the value of omitted data;

(4) Monuments called for are of lessened dignity because of the lack of complete confirmatory evidence independent of the testimony of interested parties.

[§ 58.] (E) **Examples of Descriptions. — (1) In a Controlled Area.**—The following is an odd and interesting description: "Beginning at a point on the west line of Garden Street, one hundred and thirty-five (135) feet north of the south line of the north curb in North Street measured along the west line of Garden Street, thence west parallel to North Street sixty-four (64) feet more or less to a point one hundred and thirty-six (136) feet east of the east line of North Main Street measured on a line parallel to North Street, thence north in a line parallel with North Main Street and one hundred and thirty-six (136) feet distant therefrom thirty-five feet (35), thence east in a line parallel with North Street sixty-four (64) feet more or less to a west line of Garden Street, thence south along west line of Garden Street to point of beginning."

The situation is shown on the accompanying sketch. The sidewalk on Garden Street is laid along the property line, but on the wider streets is one and a half feet therefrom. The referencing of the beginning point of a line of the curb is most interesting, for it suggests the work of a man who understood the necessity of control, but who possibly did

not care to go to the expense of a survey to refer the point to the street lines. There is also another possible reason.

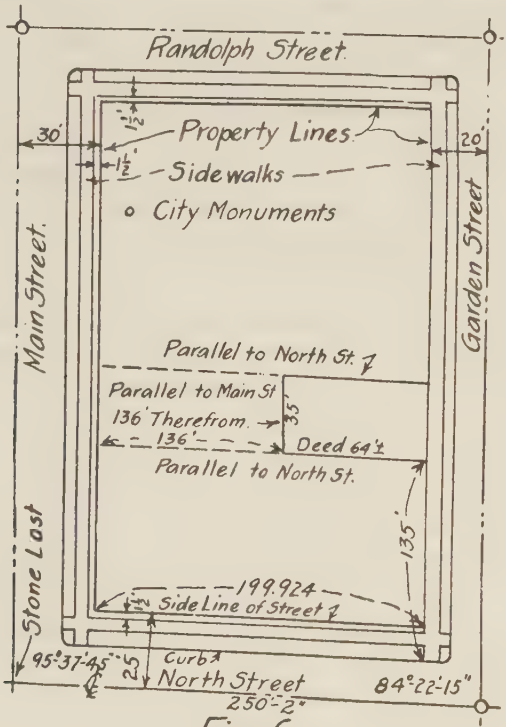


Fig. 6.

Some of the property owners along North Street claim that it has been moved in its location, those to the south claiming that it encroaches upon them, and those to the north maintaining likewise. This is not supported by surveys except in a few isolated cases where the conflict is most likely due to other conditions. However, under these circumstances the scrivener may have preferred to tie to an established curb line rather than a monumented line, questioned by certain parties, yet hardly in dispute.

It is most interesting to note how the description has been written with regard to the lines of the abutting prop-

erties. Evidently the deed to the adjoining lot on North Main Street was referred to and the rear line described from data contained therein, making the length of the side lines more or less to comply with the definite call taken from this deed. One feature which distinguishes this description from others pertaining to properties in this vicinity is the care taken in giving the directions of each line.

This property can be surveyed without reference to the deeds of other lots, and when the distance from the north line of North Street to the south line of the north curb is established, recourse to the deeds of the surrounding properties will reveal the presence of overlaps or gaps if any. The necessity of a field measurement to coordinate the beginning point to the legally defined street line is the one weakness of the description, and as explained, there is a possible reason for this being done purposely.

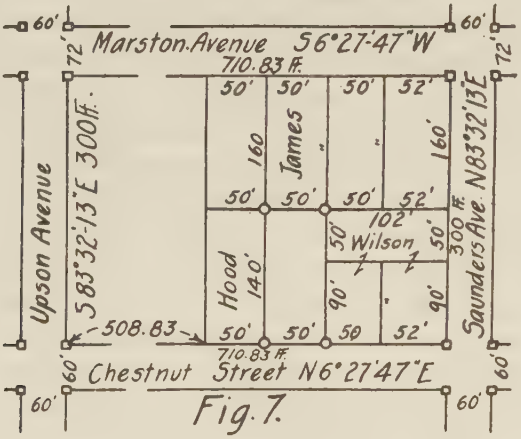
For further purposes of illustrations fictitious data will be used, and brevity will be sacrificed wherever there is opportunity to repeat quantitative data, for it must be recognized that errors are sure to occur at times, even when work is carefully checked, but that when varying methods of expression are used the same mistake is not likely to be repeated. In the comments following each description this and other points will be brought out.

Case I.

A lot in a rectangular block controlled by city monuments.

"Beginning at a point on the east side of Chestnut Street marked by the head of brass screw set in a two-inch concrete filled pipe and located one hundred and two (102) feet northerly from the city stone at the intersection of the east line of Chestnut Street with the north line of Saunders Avenue; thence N 6°-27′-47″E along the east line of Chestnut Street fifty (50) feet to a point marked similarly to the point of beginning and a distance of five

hundred and fifty-eight and eighty-three one hundredths (558.83) feet southerly from a city stone at the intersec-



tion of the easterly line of Chestnut Street with the southerly line of Upson Avenue; thence at right angles to Chestnut Street S 83°-32′-13″E a distance of one hundred and forty (140) feet to a point one hundred and sixty (160) feet from the west line of Marston Avenue, thence at right angles S 6°-27′-47″W parallel to Chestnut Street and to Marston Avenue, a distance of fifty (50) feet; thence at right angles to the preceding course and to Chestnut Street N 83°-32′-13″W a distance of one hundred and forty (140) feet to the point of beginning, being bounded on the west by Chestnut Street, on the north by lot of A. C. Hood, on the east by C. C. James, and on the south by B. K. Wilson, and meaning and intending to convey a lot facing a full fifty (50) feet on Chestnut Street and extending back between lines at right angles to the street a full one hundred and forty (140) feet, the same being all of the lot conveyed to me by R. M. Larson by deed dated May 26, 1925, and recorded in Deed Book 212, page 696."

The beginning point and the terminal of the first course

are marked by private monuments which are referred to the city stones within the block, and the city plat shows within less than one thousand feet seven other stones on street lines and of known location. Even without reference to the more remote points the point of beginning can not be lost, for the city stones form part of a controlled survey. The frontage between the stones on Chestnut Street is shown as seven hundred and ten and eighty-three one hundredths feet, and this checks with (102 + 50 + 558.83) as called for.

The true bearing of Chestnut Street and of Marston Avenue is given on the city map as N 6°-27′-47″-E, and this has been used as a basis for the survey. To avoid errors caused by a slip in transcribing, the four interior angles have been called for. This is better than spelling out the numbers giving the magnitude of the bearing, for it utilizes the angular values actually measured in the field and used in calculating the bearings of the side lines, thus checking against errors in calculation as well as in transcription.

The calls for the adjoiners weaken the description from the grantee's standpoint, for in case of conflict they may prevail over the dimensions, although this control is largely overcome by the distinct statement that the measurements are to be full and the lot of the size given in the distance calls. The wording is a compromise between the parties to the transaction. The closing clause is to overcome a possibility that a future surplus of no value to the grantor's heirs might prevent the amalgamation of adjoining properties. The qualification of the calls for the adjoiners by the repetition of the dimensions of the lot might nullify their effect in giving title to such a strip, and while the grantor still desired a loophole in case of a shortage of no consequence, he had no desire to create a possible impediment to future owners. It is questionable as to how fully he has protected his own interests in case of a short-

age for the wording certainly emphasizes the regard given to linear dimensions at the time of the transaction.

The first call for course and distance is "along the east line of Chestnut Street," and this implies that whatever fee the grantor may have in the street is retained, but later the deed states that it is the intention to convey a lot bounded on west by Chestnut Street which is construed to mean the center line. As the street was properly dedicated and accepted, and the fee to the same is in the city, this apparent conflict is of little consequence. If desirable a clause might be added to clear the intention.

Case II.

[§ 59.] (2) In an Uncontrolled Area.—The following description is of a lot in a suburban area where the owner of the tract is selling off his frontage in small parcels according to a predetermined scheme which will permit of streets being laid out in the future. The tract has not been subdivided, and the few lots for sale are conveyed by course and distance. One boundary of the tract is definite and of known location, but the frontage along the road is subject to slight variation.

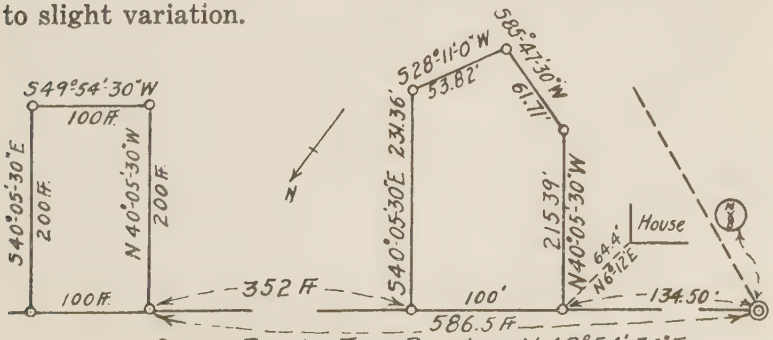


Fig. 8.

"Beginning at a point on the southeasterly side of Carter Road marked by a screw in a two-inch concrete filled pipe

located N 49°-54′-30″ E a distance of one hundred and thirty-four and one-half (134.5) feet from a stone buried plough deep on the southeasterly side of the road where the rail fence marking the southerly line of the larger tract of which this lot is a part intersects the southeasterly line of Carter Road, the latter stone being marked with a cross and the initials M. B.; thence along the southeast line of Carter Road N 49°-54′-30″ E by true bearing a distance of one hundred (100) feet to a point marked by a monument, said point being S 42°-38′ W, a distance of twenty-six and nine-tenths (26.9) feet from a nail driven in the root of a white ash, thence at right angles to Carter Road S 40°-05′-30″ E a distance of two hundred and thirty-one and sixty-three one hundredths (231.63) feet to a monument, said point being N 63°-52′ E, a distance of forty-eight and sixty-five one hundredths (48.65) feet from a nail in the root of a willow oak; thence at an angle of one hundred and eleven (111) degrees forty-three and one-half (43½) minutes S 28°-11′-0″ W a distance of fifty-three and eighty-two one hundredths (53.82) feet to a monument, said point being S 4°-26′E a distance of ten and one-half (10.5) feet from the nail in the root of a pin oak and N 56°-20′E a distance of eight and six-tenths (8.6) feet from a nail in a sweet gum; thence at an angle of one hundred and twenty-two (122) degrees twenty-three and one-half (23½) minutes S 85°-47′-30″W a distance of sixty-one and seventy-one one hundredths (61.71) feet to a monument, said point being S 28°-48′W a distance of eighteen and one-half (18.5) feet from a nail in a willow oak, thence at an angle of one hundred and twenty-five (125) degrees fifty-three (53) minutes, N 40°-05′-30″W and at right angles to Carter Road a distance of two hundred and fifteen and thirty-nine one hundredths (215.39) feet to point of beginning, said point being S 78°-05′W a distance of twelve and seven-tenths (12.7) feet from a nail in a willow oak and

N 6°-12′E a distance of sixty-four and four-tenths (64.4) feet from the northwest corner of a house belonging to the party of the first part. The property herein conveyed is bounded on the northwesterly side by Carter Road, the fee of which to the center line is conveyed to the party of the second part subject to the public easement as a road, and on the remaining sides by the property of the party of the first part, and is a lot out of a larger tract deeded to me by George H. Darner by deed dated Aug. 18, 1908, and recorded in Deed Book 207, page 346. All monuments called for as corner points are two-inch pipes filled with concrete set level with the ground and marked in the center with a screw."

The above description is not entirely fictitious. The quantitative data is taken from actual field measurements. Computations establish that the error of closure is less than one-eighth of an inch (perimeter over 662 feet) and the precision of the survey better than 1/90,000. The condition of Carter Road warrants the care taken in referencing the lot corners. The highway at present is roughly graded, and is likely to become a short route into the adjacent city. The lot is above sidewalk grade, which is only roughed out, and when the street is improved both monuments at the street corners of the lot and even the tract monument buried plough deep are subject to possible destruction. At present there is neither water nor sewer in the street, but when these are put in and connections made to the house, the practice of the local water authorities to bring in one connection for two adjacent properties and to branch the same at the lot corner further threatens one of the monuments there located. The beginning point has been tied to the definite boundary of the tract. If the other tract line intersecting Carter Road was known, the distance from the terminal of the first course to this corner would have been stated.

This situation emphasizes the advantage of a horizontal control to which a survey may be tied. A lot described merely by course and distance and referenced to monuments under the control of the city engineer who supervises the improvement of streets is better located than one referred to private uncoordinated stones merely confirming one another. A written description at its best is involved, but when it is necessary to add witnesses of the corners, the deed becomes entirely too complicated, and simplification can be made only at the sacrifice of security. If the lot had been in an open field, witness points would have been difficult to find, and the control would have been weakened.

Unquestionably the safest control for a lot such as above described is a substantial fence built immediately after the property is acquired and before the original stakes are lost; but this is not always done, and where the corners are not referenced the location is subject to loss, especially if the community develops slowly. The next conveyance out of this tract strengthens the control by tying to the corners of this property.

Case III.

A lot located in the same tract as in Case II, which, if the property is developed, will be at the corner of a street intersecting Carter Road. The grantor, at the time of conveyance, does not desire to open the road, and the purchaser understands that in the conveyance no fee or easement in the possible future street is to pass. The purchase is confined entirely to a lot facing on Carter Road, and the fee to the center of the latter subject to the public easement.

It is unnecessary to give the complete description, and only the point of beginning will be considered. Wherever lots are conveyed from an uncontrolled area, the effort should be to refer all starting points to the same monu-

ment, for in this way the descriptions are coordinated with one another and at any time the frontage remaining may be calculated. Thus between the first grant out of the original tract and the second there are two fifty-foot lots, three sixty-foot lots, and one seventy-two-foot proposed street, making a frontage of three hundred and fifty-two feet remaining in the grantor. Therefore, referring to the first grant out, the lot is described as "beginning at a point on the southeasterly side of Carter Road marked by a screw in a two-inch concrete filled pipe located five hundred and eighty-six and one-half (586.5) feet from a stone buried plough deep on the southeasterly side of Carter Road where the rail fence marking the southerly line of the tract of which this lot is a part intersects the southeasterly line of Carter Road, the latter stone being marked with a cross and the initials M. B. and being the same stone to which the beginning point of the lot conveyed by me to R. M. Bull on Feb. 12, 1926, is referred; thence along Carter Road N 49°-54′-30″E by true bearing a distance of ——, (thence by true bearings and exact distances around the lot to the point of beginning,[84] stating all the interior angles and tying each corner to at least one witness. The property herein conveyed is lot bounded on the northwesterly side by Carter Road, the fee of which to the center line is conveyed to the party of the second part subject to the public easement, and on the southerly side by a contemplated street to be opened at the discretion of the party of the first part, who reserves all title and interest in the bed of the same, and the lot is a part of a larger tract ————."

The details regarding the contemplated street are given to avoid a remote possibility of misunderstanding twenty years hence if the street is opened and then vacated because of failure of the development. The fact that the conveyance carries the grant to the side line gives the

[84]See preceding description.

grantee weak claim to the fee in the road bed to the center line which might, when the history of the street is forgotten, enable him to annoy his neighbor.

The tying of the beginning point of this lot to the same stone of the larger tract as is used for the referencing of the beginning point of the lot previously conveyed and the use of the true bearing of Carter Road strengthens the control of both lots.

CHAPTER II

RELATIVE IMPORTANCE

OF

CONFLICTING ELEMENTS

I. CONTROL OF INTENTION.

Section.

65. The Rule.
66. Method of Application.
67. Effect of Conflict.
68. Parol and Extrinsic Evidence as Aids.
69. Parol and Extrinsic Evidence as Explanation.
70. Limitation of Parol and Extrinsic Evidence.
71. Basic Rule to Determine Intention — Foundation and Purpose.
72. The Rule.
73. Limitations.
74. Effect of Local Conditions.
75. Surveying Methods Based on Rules of Construction—Foundation.
76. The Rule.

II. CONTROL OF LINES MARKED AND SURVEYED.

77. Over Natural Monuments—The Rule.
78. Application.
79. Considerations Essential to Render Rule Operative.
80. Over Maps and Plats—General.
81. The Rule.
82. Application.
83. Considerations Essential to Render Rule Operative.
84. Over Adjoiners—The Rule.
85. Effect of Adjoiner Being Marked or Unmarked.
86. Effect of Relative Certainty and Possible Error.
87. Considerations Essential to Render Rule Operative.
88. Over Course and Distance—The Rule.
89. Application.
90. Considerations Essential to render Rule Operative.
91. Over Quantity.

III. CONTROL OF NATURAL MONUMENTS.

Section.
92. General.
93. Definition and Requisite Properties.
94. Classification.
95. The General Rule.
96. Application.
97. Exceptions—General.
98. Effect of Definite and Certain Description.
99. Effect of Evident Error.
100. Effect of Destruction.
101. Line of an Adjoiner as a Monument—The Rule.
101.1. Effect.
102. Application.
103. Over Artificial Monuments—The Rule.
104. Application.
105. Exceptions.
106. Over Maps and Plats—The Rule.
107. Application.
108. Effect of Conflict.
109. Exceptions—Effect of Intention.
110. Necessity of Call for Monument.
111. Over Course and Distance—The Rule.
112. Application—As guide to Intention.
113. To Give Control to Certainty and to Harmonize Deeds.
114. Considerations Essential to Render Rule Operative.
115. Course and Distance an Aid to Identity.
116. Exceptions to the Rule—Necessity of Call.
117. Effect of Intention.
118. Effect of evident error.
119. Effect of Local Conditions.
120. Effect of Relative Certainty.
121. Over Quantity.
122. Control as Between Several Monuments—The Rule.
123. Application — Survey from Original Corners.
124. Effect of Purpose of Monument.
125. Course and Distance as Aids.
126. No Call for Monument.

IV. CONTROL OF ARTIFICIAL MONUMENTS.

129. General.
130. Stakes as Artificial Monuments—General.
131. Identity as Important Factor.
132. Identity Aided by Evidence.
133. Stakes as Lines Marked and Surveyed.
134. The General Rule.
135. Over Plats—The Rule.
136. Application—Effect of evident error.
136.1. Effect of Practical Location.
137. Effect of Attendant Circumstances.
138. Government Monuments an Exception.
139. Over Adjoiners—The Rule.
140. Application.
141. Exceptions.
142. Over Course and Distances—The Rule.
143. Reasons for Strength of Rule.
144. Application—Effect of Survey from Original Stakes.
145. Effect of Cooberative Evidence.
146. Application to Party Walls—General.
147. Call Must be Locative.
148. Call Must Fix Terminal.
149. Rule Not General.
150. Only Locative Distances Control.
151. Considerations Essential to Render Rule Operative.
152. Exceptions.
153. Over Quantity.

V. CONTROL OF MAPS AND PLATS.

Section.
154. Function.
155. The General Rule.
156. Application—Plat More Certain.
157. Plat Must be Referred to.
158. Effect of Conflict With Notes.
159. Over Adjoiners—The Rule.
160. Application.
161. Over Course and Distances—The Rule.
162. Application — Plat Controls Calls of Deed.
163. Plat Establishes Superior Monuments.
164. Effect of Established Adjoiner Being Unmarked.
165. Over Quantity—The Rule.
166. Application.

VI. CONTROL OF ADJOINERS.

167. Over Course and Distance—The Rule.
168. Reasons for Rule—Best Evidence of Intention.
169. Least Liable to Error.
170. Application—Lines Marked.
171. Lines Unmarked—Effect of Visibility.
172. Invisibility May be Overcome.
173. Effect of Occupation.
174. Effect of intention.
175. Considerations Essential to Render Rule Operative—Line Must be Called for in Deed.
176. Line Must Exist When Call is Made.
176.1. Line Must be Certain and Locative.
177. Exceptions—Effect of Intention and Error.
178. Effect of Necessity to Depart from Calls.
179. Effect of actions of Parties at Time of Transaction.
180. Effect of Line Being Unmarked.
181. Over Quantity—The Rule.
182. Application.

VII. METES AND BOUNDS.

182.1. Metes and Bounds.

VIII. CONTROL OF COURSE AND DISTANCE.

183. General.
184. The Rule.
185. Application—Where No Superior all is Made.
186. Where Location or Identity is doubtful.
187. Where call is Erroneous.

IX. CONTROL BETWEEN COURSE AND DISTANCE.

188. General.
189. The Rule.
190. Application—Effect of One Element being Uncertain.
191. Effect of Occupancy.
192. Effect of Evident Error.
193. Effect of Established Error.
194. Procedure to Adjust Survey Where Course and Distance Conflict—General.
195. Irrational Adjustment Throwing all Error Into Distance.
196. Rational Adjustment Changing Course or Distance as Circumstances Require—Control of Intention.
197. Situation Survey the Foundation of Adjustment.
198. Suggestions for Further Procedure.
199. Over Quantity—The Rule.
200. Application.

X. CONTROL OF QUANTITY.

Section.
201. General.
202. The Rule.
203. Effect of Words "More or Less."
204. Effect of Local Conditions.
205. Application—Where Superior Calls Are Not Set Forth.
206. Where Quantity Determines Which of Two Lines is Intended.
207. Where Quantity is Essence of Contract.
208. Effect of Survey.
209. Where Quantity Establishes Intention.

XI. RELATIVE IMPORTANCE OF CONFLICTING GRANTS.

210. The Rule.
211. Exceptions.

XII. RELATIVE IMPORTANCE OF CONFLICTING SURVEYS.

212. Relative Importance of Conflicting Surveys.

I. CONTROL OF INTENTION.

[§ 65.] (A) **The Rule.**—The ancient rigidity of technical rules[1] has given way in modern times to the more sensible and practical rule of the control of actual expressed intention[2] as set forth by Judge Savage of Maine who said, "The cardinal rule for the interpretation of deeds and other written instruments is the expressed intention of the parties, gathered from all parts of the instrument, giving each word its due force, and read in the light of existing conditions and circumstances. It is the intention effectually expressed, not merely surmised. This rule controls all others."[3] Judge Sanderson of California graphically outlined how this intention is to be ascertained when he ruled that in construing instruments, "the only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in books—is to place ourselves as nearly as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by the four corners, read it."[4]

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[1]See § 72, infra.

[2]Penley v. Emmons, 117 Maine 108, 102 Atl. 972, citing Perry v. Buswell, 113 Maine 399, 94 Atl. 483.

[3]Perry v. Buswell, 113 Maine 399, 94 Atl. 483, 484, citing Pike v. Munroe, 36 Maine 309, 58 Am. Dec. 751.

[4]Walsh v. Hill, 38 Cal. 481, 487.

[§ 66.] (1) **Method of Application.**—When the engineer pictures himself in the seat of the scrivener he should keep in mind that—

(1) The object of the construction of a deed is to discover and effectuate the intention of the parties.[5]

(2) The intention is to be gathered from the words of the conveyance read in the light of surrounding circumstances.[6]

(3) The conveyance is presumed to be made with reference to the conditions and state of the premises at the time, and no subsequent change will invalidate it.[7]

(4) A construction which is consistent with all the terms of the description should be given, rather than one consistent with some of these terms.[8]

(5) It is the intention of the parties definitely expressed in the instrument that controls.[9]

The great strength of this rule is illustrated in Wells v. Lagorio[10] where the intention of the parties was established by their acts and understanding of the situation at the time of the transaction, and by the lines they marked on the ground and recognized as including the land conveyed.[11] Wells owned sixty (60) acres more or less which he understood was bounded by HFEB. He sold the west half, thirty (30) acres more or less (HGDB) to one Lord, who afterwards conveyed to Lagorio; and defined it by establishing D midway between B and E, and G midway between H and F. Later he sold the east half thirty (30) acres more or

[5]Derham v. Hill, 57 Colo. 345, 142 Pac. 181.

[6]Derham v. Hill, 57 Colo. 345, 142 Pac. 181.

[7]Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250. See Streets, § 267.

[8]Lovejoy v. Gaskill, 30 Minn. 137, 14 N. W. 583. Columbia City Land Co. v. Ruhl, 70 Ore. 246, 134 Pac. 1035, 141 Pac. 208.

[9]Cooperative Bldg. Bank v. Hawkins, 30 R. I. 171, 73 Atl. 617.

[10]112 Va. 522, 71 S. E. 713.

[11]See Control of Lines Marked and Surveyed, § 77, infra.

less to Beckett and bounded definitely by GFED. Wells honestly believed that he had disposed of the entire property until Denby, who acquired the adjoining property JIA

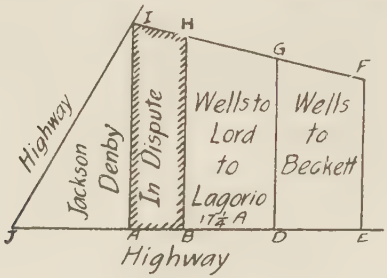

Fig. 9.

several years later had a survey made and advised Wells that the area AIHB was his. Lagorio and Beckett immediately claimed the area in question as theirs, and the matter reached the courts. Evidence showed that the parties had taken possession as described, and that the intention of the parties had been given effect without consideration of the area AIHB in dispute, and the court ruled that it therefore belonged to Wells regardless of the deficiency in areas of the lots of Lagorio and Beckett.

[§ 67.] (2) **Effect of Conflict.**—The fact that there is a possible or actual conflict in the description does not nullify the rule, but rather makes its application without modification more pertinent, for when the calls of a description are definite and clearly expressed in the instrument, they should not be extended to conform to an intention which might be discovered from other parts of the description, or from extrinsic evidence, the chief purpose being to develop the true intent of the language used;[12] and "if the descriptive words are with reference to actual facts, repugnant, or inconsistent with one another, and yet the inten-

[12]Cooperative Bldg. Bank v. Hawkins, 30 R. I. 171, 73 Atl. 617.

tion of the parties can be ascertained, the misdescription will not vitiate the instrument; but it will yield to the clearly ascertained intention."[13]

[§ 68.] (3) **Parol and Extrinsic Evidence as Aids.**—Parol evidence is admissible to identify the property described in and conveyed by a deed, and to ascertain to what property the particulars in a deed apply.[14] Furthermore, extrinsic facts pointed out in the description may be resorted to, and the property may be identified by extrinsic evidence as in the case of records of the county in which the land is situated.[15] If the intention of the parties can be ascertained from the language of a deed with due consideration to the situation in which they were when the writing was made, parol or extraneous evidence is not admissible; but if in attempting to apply the language to the subject-matter two situations should be presented, either of which would answer the terms of the writing with equal certainty, parol evidence is admissible to prove which of the two situations the parties had in mind.[16]

[§ 69.] (4) **Parol and Extrinsic Evidence as Explanation.**—However the use of parol evidence is not limited to cases of evident conflict or dual interpretation, and it may be applied for purposes of explanation. It is always competent to give in evidence existing circumstances, such as the actual condition and situation of land, buildings, passages, water-courses, and local objects in order to give definite meaning to the language used in a deed and to show the sense in which particular words were used by the parties, especially in matters of description.[17]

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[13]Cleaveland v. Smith, 5 Fed. Cas. No. 2874, p. 1006, 2 Story 278, per Story, J.

[14]Wetzler v. Nichols, 53 Wash. 285, 101 Pac. 867, 132 Am. St. 1075; York v. Hogg, 142 Ky. 704, 134 S. W. 1125.

[15]Holley v. Curry, 58 W. Va. 70, 51 S. E. 135.

[16]Saunders v. Publishers Paper Co., 208 Fed. 441.

[17]Chattahoochie &c. R. Co. v. Pilcher, 163 Ala. 401, 51 So. 11.

[§ 70.] (5) **Limitation of Parol and Extrinsic Evidence.**—These citations clearly limit the admissibility of parol and extraneous evidence which is permissible only when it supports by confirmation or explanation the intention as effectively expressed in the description. Parol evidence is not admissible to prove that the parties intended something different from that which the written language expresses or which may be the legal inference and conclusion to be drawn from it.[18]

[§ 71.] (B) **Basic Rule to Determine Intention.—(1) Foundation and Purpose.**—The modern principle that the intention as effectively expressed is supreme has changed the technical rules regarding the weight to be given such conflicting elements as monuments, courses and distances, metes and bounds, etc., from criteria sufficient in themselves to aids in the determination of the intention. Founded as they are upon experience and observation, and not on theory, the only academic consideration entering into the determination of precedence being that the most material, certain and least liable to error should prevail;[19] and seeking as they do to determine where the line was originally and actually located by the surveyor, not where it should have been located theoretically,[20] they aim to give finality to the location of lines, and warn the engineer against upsetting the status quo of the community for the purpose of establishing conformity to a plan or theory.

Experience has shown that monuments necessitating no special training for their understanding by the layman, and being least liable to variation, are of the greatest significance.[21] Furthermore, monuments project a picture of the description on the ground and being, as it were, an actual

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[18]Chattahoochie &c. R. Co. v. Pilcher, 163 Ala. 401, 51 So. 11.

[19]Newsom v. Pryor, 7 Wheat. (20 U. S.) 7, 5 L. ed. 382.

[20]Kendrick v. Johnson (Tex. Civ. App.), 173 S. W. 914.

[21]Stafford v. King, 30 Tex. 257, 94 Am. Dec. 304.

plat laid down on the land, are not liable to errors of transcription. Therefore they are to be given the greatest weight, and those monuments which or locative are of greater value than those which are merely descriptive.[22] On the other hand, quantity is subject to all the errors and inaccuracies of a survey, and can not always be approximately estimated by experienced engineers. Therefore it is subordinated to all other considerations.

[§ 72.] (2) **The Rule.**—This reasoning leads to the rule that in weighting the calls of a deed for the purpose of ascertaining the intention, certainty and definiteness give natural monuments precedence over all other calls; that artificial monuments rank second, adjoiners third, course and distance fourth, and quantity last.[23]

[§ 73.] (3) **Limitations.**—The only purpose of the foregoing rules of construction is to enable us to reach the probable intent of the parties in order that we may give it effect; and if these rules were not somewhat flexible and capable of modification by the circumstances of any particular case, they would in many instances defeat the actual intent, even when it is obvious on the face of the instrument, and therefore in case of conflicting particulars in a description, that one particular in respect to which there is the least likelihood of error should control because it is the most likely to effectuate the actual intent.[24] If the particular facts in a given case establish that it is an exception to general experience, the usual rules of construction can not be resorted to to ascertain the intention of the parties, for to apply it would give greater importance to the rule itself than to the reason for it.[25]

[22]Stafford v. King, 30 Tex. 257, 94 Am. Dec. 304.

[23]Meyer v. Comegys, 147 La. 851, 86 So. 307; Pritchard v. Rebori, 135 Tenn. 328, 186 S. W. 121.

[24]Moran v. Lezotte, 54 Mich. 83, 19 N. W. 757; Connor v. Johnson, 59 S. Car. 115, 37 S. E. 240.

[25]Demklin, J., dissenting in Kendrick v. Johnson (Tex. Civ. App.), 173 S. W. 914.

[§ 74.] (4) **Effect of Local Conditions.**—It should be further borne in mind that in certain particulars city surveys are radically different from those of large tracts and farms, and that this fact should be reflected in the application of the general rule. "Ordinarily, surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land," but "where the lines are so short as evidently to be susceptible of entire accuracy in their measurement, and are defined in such a manner as to indicate an exercise of care in describing the premises, such a description is regarded with great confidence as a means of ascertaining what is intended to be conveyed."[26] In the open country it is more certain to call for definite, enduring and easily identified monuments as marking the beginning and end of a course, and, as suggested previously, these are really more significant to the parties. In the city the ground is comparatively level, the distances usually short, easily measured, and generally speaking more significant, especially when expressed with great precision.[27] Furthermore, improvements crowd so close to the lines that frontage and depth are essential factors in determining the desirability of a lot, and as such enter into every transaction. The very custom of valuing land as worth so much per front foot is indicative of the consideration given to dimensions. These facts do not in themselves give ground for abandoning the general guiding rule regarding the order of control, but rather emphasize that in the city, distance, if actually measured, is to be given greater weight than in

[26]Higuera v. United States, 5 Wall. (72 U. S.) 827, 18 L. ed. 469.

[27]Vanderbilt University v. Williams, 152 Tenn. 664, 280 S. W. 689.

the open country when being considered with other elements to ascertain the intention.

[§ 75.] (C) **Surveying Methods Based on Rules of Construction.—(1) Foundation.**—The rules of construction state the order of precedence to be given the various calls of a deed to determine the intention and to locate the line as originally and actually run. Unless this purpose is kept in mind in the selection of the surveying methods to be applied it may be overcome by the field work. Long experience and common sense establish that long occupancy of city lots and improvements thereof in accordance with lines and corners which have been marked at the time the plat was filed are better evidence of the correct location of the lines than deductions and measures of a surveyor based on assumed corners,[28] and that the stakes of an original survey of city lots are better evidence of the location of a lot than a survey based upon marks and field notes of a previous survey not shown to be correct.[29]

[§ 76.] (2) **The Rule.**—These considerations have led the courts to lay down as the logical order of precedence in the application of surveying methods the following:

(a) Find the lines actually run and the corners and monuments actually established by the original survey.[30]

(b) Run lines from known, established, or recognized corners and monuments of the original survey.[31]

(c) Run lines according to courses and distances marked on the plat or called for in the deed.

Furthermore, the fact that the original location of the stakes set at the property lines when the land is subdivided

[28]Harris v. Lewis, 156 Iowa 413, 136 N. W. 674.

[29]Kuglin v. Bock, 181 Ill. 165, 54 N. E. 907.

[30]See §§ 77-91, 123, 145, 255.

[31]See §§ 111, 123, 258.

does not conform exactly with that shown on the plat does not overcome this rule.[32]

II. CONTROL OF LINES MARKED AND SURVEYED.

[§ 77.] **(A) Over Natural Monuments. — (1) The Rule.**—The lines and corners actually located upon the ground by the parties to a transaction prevail, if known, over all calls including those for monuments.[33] As monuments, especially those classed as natural, are given great weight in the determination of boundaries, it is apparent that this rule depends for its strength upon the fact that the lines marked are the most certain evidence of the intention of the parties, and that there is a greater possibility of error in the call for the monument when it is lacking in an essential quality, especially visibility.

[§ 78.] **(2) Application.**—That the above is true is illustrated in Stefanick v. Fortona[34] where an iron pipe set to mark a corner prevailed over an unmarked street line. Cohen from whom Stefanick purchased, owned a lot 66x198 on the northeast corner of Mill and Hoosac streets. It was bounded on the north and east by land of P. Connors. The deed of that portion purchased by Stefanick read as follows: "Beginning at a point in line between lands of grantor and those of P. Connors, distant ninety-one (91) feet from a stone monument standing in northerly line of Hoosac street, thence in east line of grantor's land one hundred and seven (107) feet to the lands of P. Connors; thence turning at right angle left and running in southerly line of said Connors' land sixty-six (66) feet to an iron pin driven in the approximate east line of Mill street; thence turning at an angle of 90° and running one hundred and seven (107) feet

[32]Ralston v. Dwiggins, 115 Kans. 842, 225 Pac. 343.

[33]Jackson v. Miller (Mo.), 195 S. W. 703.

[34]222 Mass. 83, 109 N. E. 878.

in approximate east line of Mill street to iron pin driven; thence turning left at an angle of 90° and running sixty-six (66) feet to place of beginning. Meaning to convey the northerly part of the Busby lot 107x66 feet."

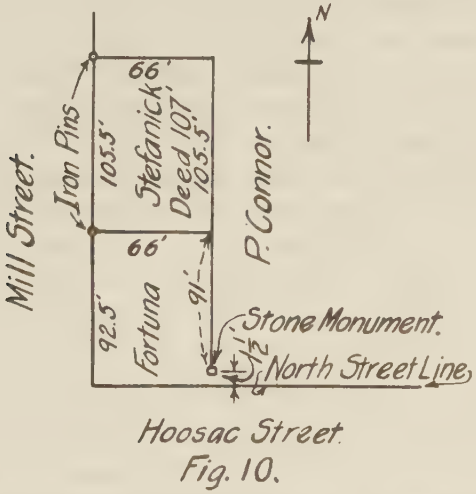

Fig. 10.

The sketch shows the situation and indicates that confusion arises from the fact that the stone monument referred to as "standing in the northerly line of Hoosac street" is in reality one and one-half feet north of such line. Hence when the measured distance of ninety-one (91) feet is subtracted from the length of the lot from the street line, there is a corresponding shortage. The details of the survey upon which the deed description was written and the manner in which Stefanick was put in possession have an important bearing on the case. The stone monument was adopted as good, and ninety-one (91) feet north an iron pin was set in P. Connors' line. A right angle was approximated and a pin set sixty-six (66) feet west in the approximate line of Mill Street. No further measurements were made, and the distance one hundred and seven (107) feet was obtained by office computation. In many respects

the case resembles that of Wells v. Lagorio.[35] The pins set and the lines of the P. Connors property mark on the ground the land intended to be conveyed, but the deed description does not apply to it. It is not stated, but it is possible that Cohen had a reason for making the south line of the lot conveyed where it was marked by pins, in which case the error would be regarding the ninety-one (91) feet as measured from the street line, and the unmeasured one hundred five and five-tenths (105.5) feet would comply with his intention. In any event the pins driven and the Connors lines were actual monuments expressing the intention of the parties at the time of the transaction, and as such controlled a call for one hundred and seven (107) feet based on an office computation and not measured on the ground.

Fortona, the defendant, also acquired title from Cohen, his deed describing the lot as "Beginning at a point where Hoosac street intersects with Mill street, thence running along the northerly line of said Hoosac street four (4) rods to a pin driven into the ground, thence turning left and running north 7° 30′ east ninety-one (91) feet to a pin driven into the ground, thence turning to the left and running north 82° 30′ west four (4) rods to a pin driven into the ground on the easterly line of said Mill street, thence turning to the left and running southerly along the easterly line of Mill street ninety-one (91) feet to the point or place of beginning." Had the second and third calls in Fortona's deed read "thence north 7° 30′ east ninety-one (91) feet to an iron pin in the south line of Stefanick, thence north 82° 30′ west along the south line of Stefanick, sixty-six (66) feet to a pin in the east line of Mill street," the superior call for the lines of the adjoiners would have prevailed to carry out the intention, even though the pins were re-

[35]See § 66, supra.

moved and no longer marked the line. In the absence of such calls the plaintiff claimed that if he did not have title to the strip in dispute, it remained in Cohen. The court held this to be irrelevant to the particular case, but advised that the extent of Fortona's lot depended upon the position of the pins in the ground, the latter controlling the description and giving him a depth along Mill Street of ninety-two and five-tenths (92.5) feet. Fortona's deed can not be cited as an example of a good description, and the custom of depending upon iron pins similar to hundreds of others, subject to removal, and with no distinctive characteristic to mark them as surveyor's corners, is to be condemned.

[§ 79.] (3) Considerations Essential to Render Rule Operative.—The rule has no application unless the line is run and marked before the execution of the deed or contemporaneously therewith, and is clearly regarded by the parties as one of the lines of the land conveyed. In Elliott v. Jefferson,[86] the court notes that a line run admittedly in contemplation of a deed may be in the nature of a preliminary survey and does not bind the grantor, as a different contract may be made or the line subsequently changed. No title is vested except by the execution of a deed, and the vital question is the intention of the grantor at *time of such execution.* The application of the rule is further dependent upon the reference in the deed to the marked line. It should be so connected with the conveyance, either by intrinsic or extrinsic evidence, as to create a presumption that the grantor intended to adopt it.[87]

[§ 80.] (B) Over Maps and Plats.—(1) General.— "A map is a transcript of the region which it portrays narrowed in compass so as to facilitate an understanding of

[86]133 N. Car. 207, 45 S. E. 558, 64 L. R. A. 135.

[87]Ritter Lbr. Co. v. Montvale Lbr. Co., 169 N. Car. 80, 85 S. E. 438.

the original."[38] As a miniature a map affords a bird's-eye view of the property showing the relation of any particular lot to others in the locality and permits the precise representation of intentions too complicated for clear written expression. From the engineer's standpoint a plat is an ideal means of permanently recording on paper the intention of the parties concerned regarding a piece of land. While the layman can, in a general way, read a map, nevertheless it is true that many of the essential points are beyond his understanding, and in the final analysis a map may not be any more significant than a description by courses and distances. He is in no position to regard the technical qualities, and a neat map lacking in essential dimensions may make a better impression than one less tidy, but correct in all details. Furthermore, maps are liable to error, and while the work on the ground is correct, the record as it appears in the plat may be wrong. This last consideration, together with the fact that it is often extremely difficult to restake a given plat on the ground because of the lack of original monuments, are the principal reasons for the control of lines marked on the ground prevailing over maps and plats.

[§ 81.] (2) **The Rule.**—"It is by the work as executed on the ground, not as projected, before execution or represented on the plan afterwards, that the actual boundaries are determined."[39] This rule has been applied in cases where the deed simply referred to a map which did not indicate the position of stakes or other monuments.

[§ 82.] (3) **Application.**—In Burke v. McCowen[40] the deeds of both parties called for "lots as laid down and delineated on the map of the Ukiah North Addition," and specified no particular survey. The original of this plat referred to in the McCowan deed did not give any dimensions

[38]Banker v. Caldwell, 3 Minn. 94, 103. See § 154, infra.

[39]Oven v. Davidson, 10 U. C. C. P. 302, 310, per Draper, J.

[40]115 Cal. 481, 47 Pac. 367.

or note the position of any stakes, but in a marginal note stated "all full sized lots are 50'x145'." There was also a copy drawn to a scale of 1" equals 200 feet referred to in the Burke deed which admittedly contemplated no changes. The lots of the plaintiff (Burke) scaled about sixty-three (63) feet frontage on the original plat. Stakes on the ground in good line for the side of an abutting alley indicated the actual lots to be fifty (50) feet wide and prevailed. The strength of the stakes in prevailing over scaled distances on the plat was acquired by their agreement with one another and with the definite marginal note. The plaintiff in the case stressed the point that the deeds involved called for the plat only and not for any particular survey. In ruling in regard to this point the court observed that "a plat is a subdivision of land into lots, streets, and alleys, marked upon the earth and represented on paper."[41]

This is in keeping with the decision in Jackson v. Freer[42] in which the court held "The map was intended to represent the relative situations and localities of the lots as regarded each other. The actual survey was the practical location, and although the patents do not specifically refer to the field book and the actual survey of the lots, they virtually referred to them by referring to the map." These citations make the scope of the rule clear, for they establish that a plat or map is in reality a record of work actually done in the field, and hence reference in a deed to the plat is a call for the original, namely the lines marked and staked in the field.

[§ 83.] (4) **Considerations Essential to Render Rule Operative.**—Naturally this rule has no application where it is established that the lines were never located and definitely fixed. Thus in Nissley v. Moeslein[43] a mortgage release referred to a plat. Certain of the boundaries involved were

[41]McDaniel v. Mace, 47 Iowa 509.
[42]17 Johns (N. Y.) 29, 31.
[43]23 Pa. Super. Ct. 119.

the center lines of streets shown on the plat, but never definitely surveyed and located on the ground. They were merely indicated roughly by meandering plow furrows which were not in conformity with the regularity and symmetry indicated on the plat. Under these circumstances the lines of the streets as delineated on the plat controlled over the crude location on the ground.[44]

Furthermore, the stakes of a survey not referred to either on the plat or in the deeds are not monuments capable of controlling course and distance. The monuments called for in the plat must govern in preference to objects on the ground not called for in the deeds.[45] In Powers v. Jackson the northwest corner of a city subdivision was given on the plat as the "N. W. Cor of E ½ of S. E. ¼ of Sec 32." This was definitely marked on the ground by an enduring monument, but in making the subdivision the starting point was taken fourteen feet north of this stake, thus making the east and west lines on the ground all fourteen feet north of their indicated position on the plat. The plaintiff claimed possession according to the stakes, and the defendant who owned the lot immediately north maintained to a line established from the government corner. The deeds involved called for the lots by number as laid down in the plan and gave no further description. The court held that the monument shown on the plat and not the one actually used but not indicated controlled the location. The facts of this case are almost identical with those of Wolpert v. Chicago[46] where the decision was absolutely contrary.

The points which differentiate the two are that in Wolpert v. Chicago the incorrect monument, supposedly on a government corner, was indicated on the plat and accepted

[44]See also § 265, infra.

[45]Powers v. Jackson, 50 Cal. 429. See also § 175, infra.

[46]280 Ill. 187, 117 N. E. 447. See §§ 253, infra.

by everyone as the point of beginning for years prior to the discovery of the error; while in Powers v. Jackson, the government corner and not the stake fourteen feet north thereof was called for in the plat, and the question of location arose before monumental structures such as fences and buildings established the incorrect lines as recognized and accepted. Hence, finality of location was best attained by giving the plat preference over inconsistent lines marked and staked on the ground. In reality this meant that it was not too late to correct the mistake and thus give effect to the intention, whereas in Wolpert v. Chicago, acquiescence in the uncalled for monument established the intention.

[§ 84.] (C) **Over Adjoiners.—(1) The Rule.**—"The location of the lines of a survey is to be determined by the lines as actually run upon the ground, where this can be ascertained; nor will this rule be varied by the fact that an adherence to it would give the locator less land than he was entitled to by his certificate; nor is the rule varied by the fact that a call is made to run to the line of an older survey, if that line was never reached in the survey actually made, but the surveyor stopped at another line which was mistaken for it."[47] Where the lines of an adjoiner are not marked and defined so as to be visible to the eye, being merely called or ideal lines, the surveyed lines will prevail, and the party claiming under them will be confined to those lines although he may have believed and intended to make them identical with the called lines.[48]

[§ 85.] (a) **Effect of Adjoiner Being Marked or Unmarked.**—In most cases supporting this rule the line of the adjoiner is unmarked and is therefore relatively weak because of its great uncertainty and possible inaccuracy as

[47]Matheny v. Allen, 63 W. Va. 443, 60 S. E. 407, 129 Am. St. 984.

[48]Jones v. Hamilton, 137 Ky. 253, 125 S. W. 695.

compared with a marked line. In Jones v. Hamilton[49] we find the qualification "Had Jones' line been a well marked visible line, then it would stand in the same attitude in solving our problem as if it were any other natural object"; that is, it would prevail over all other calls. This is on the theory that there can be no error in the call for the adjoiner when it is marked, but as set forth in Matheny v. Allen this is not true, for there is always the possibility of mistaken identity. In fact this very condition led to the confusion in Jones v. Hamilton, for the finding of a marked line along which he ran gave the engineer reason to believe that it was the Jones line which, although it had the same terminals, was unmarked, consisted of several courses and included, between it and the marked line actually run, some twenty-eight acres, a quantity greater than that of the grant laid down.

[§ 86.] (b) **Effect of Relative Certainty and Possible Error.**—In Maddox v. Fenner[50] the court says "Probably no general rule on the subject can be safely announced." This means that each case must be decided according to the significance of the surrounding circumstances, giving control to the surveyed line if it effectuates the intention as definitely expressed, taking into account the relative probability of error in the surveyed and marked line and the call for the adjoiner regardless of whether the latter is marked or unmarked.

[§ 87.] (2) **Considerations Necessary to Render Rule Operative.**—As the rule is based on the theory that practical location is the best evidence of the intention of the parties, it fails when no such location has been made, for "when such lines have never been surveyed or, if surveyed, their location upon the ground can not be ascertained, re-

[49] 137 Ky. 253, 125 S. W. 695. See also §§ 120, 171, 176(a), 177, 180.

[50] 79 Tex. 279, 15 S. W. 237.

sort may be had to lines of adjoining surveys to determine their location."[51] This limitation applies whether the adjoiner is marked or unmarked, for, considered from the standpoint of relative certainty, the office call for a line having no actual existence is subject to misunderstanding and error, whereas the line of adjoiner although unmarked is relatively far more significant.

[§ 88.] **(D) Over Course and Distance.—(1) The Rule.**—Where the original corners and lines are established they must control over course and distance,[52] for where the "footsteps" of the surveyor in making the survey are found and identified, all classes of calls contained in the deed must yield to the survey thus established.[53]

[§ 89.] **(2) Application.**—This rule is most effective in giving control to intention, and that it establishes finality in boundaries is well shown in the case of Bolden v. Sherman.[54] In August, 1847, Sherman bought from Augustus Garrett a piece of land on State Street, Chicago, and the deed was recorded in November of the same year. In 1849 Garrett in attempting to fence his remaining land established his south fence six feet over on Sherman's land. There was no evidence to indicate the location of the fences along his other lines, and in 1856 when his wife's executors platted the estate north of Sherman, the surveyor took the fence on Sherman's land, the only remaining one, as good, and laid off eleven lots, one next to the fence twenty-seven (27) feet wide, and the ten to the north each twenty-four (24) feet on State Street. This naturally left an unplatted space of some six feet between Lot One and the property of Ann Seaman, the abutter on the north of the Garrett estate. In 1856 the executors deeded to Charles Farren

[51]Silsby v. Kinsley, 89 Vt. 263, 95 Atl. 634.

[52]Nelson v. Hall, 17 Fed. Cas. No. 10107, 1 McLean 518.

[53]Millerman v. Megaritty (Tex. Civ. App.), 242 S. W. 757.

[54]110 Ill. 418.

two lots described as follows: "Commencing at a point on State St. 216 feet south of northwest corner of land of Eliza Garrett estate—which adjoins land of Mrs. Ann Sea-

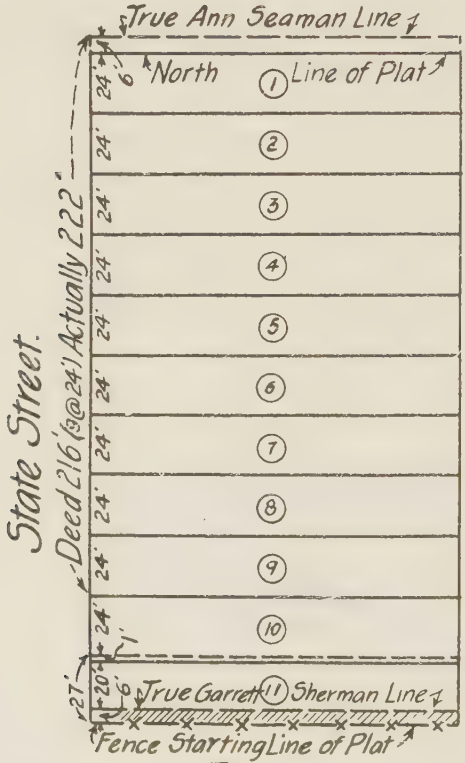

Fig. 11.

man—running south 51 feet, thence east 170 feet, thence north 51 feet, thence west 170 feet to point of beginning." Stevens, Farren's assignee sold Lot Ten and one foot of Lot Eleven to Kate Howard, who erected a house fronting twenty-five (25) feet on State Street set in accordance with stakes marking Lot Ten and leaving twenty-six (26) feet between the wall and the fence. The northwest corner of this house was in fact two hundred and twenty-two (222)

feet from the true northwest corner of the Garrett Estate. In 1861 Stevens took possession of Lot Eleven and built a house occupying the full twenty-six (26) feet, six feet of which was on ground to which Sherman proved title by deed of Garrett dated 1847. In 1880 Sherman brought suit against Bolden, a tenant of Stevens' who claimed as owner to eject them from the strip in dispute. In ruling on the point in question the court held "Where a lot is sold as platted, the fences and surveyor's marks upon the ground, as stakes, are facts indicating its boundaries and will prevail over an attempt to describe lots by distances."

[§ 90.] (3) Considerations Essential to Render Rule Operative.—If the rule is regarded as a guide to ascertain the intention of the parties to a transaction, the conditions necessary for its application are patent. In the first place the lines must be marked prior or at the time of the grant;[55] otherwise they can not be regarded as representing the intention of the grantor, and for the same reason they must be adopted by the grantor, either directly or indirectly through reference to a plat showing them and by incorporating them in the deed.[56] Furthermore, the lines must be identified for otherwise they lack an essential qualification of a monument.[57] Lastly, where lines do not agree with course and distance, evidence of their actual location must be so clear and satisfactory as to establish actual location beyond doubt and question.[58] The mere fact that lines and corners are known to have been run and marked or are found near where courses and distances in the deed run is not conclusive that they are the lines and courses of the land referred to in the deed, and where there is no ap-

[55]Woodbury v. Venia, 114 Mich. 251, 72 N. W. 189.

[56]Missouri, K. &c. R. Co. v. Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

[57]Eldora v. Edgington, 130 Iowa 151, 106 N. W. 503 (§ 254, infra); Hoge v. Lee, 184 N. Car. 44, 113 S. E. 776.

[58]Albert v. Salem, 39 Ore. 466, 65 Pac. 1068, 66 Pac. 233.

proximation to the calls of the deed, they may be disregarded.[59]

[§ 91.] **(E) Over Quantity.**—A call for quantity inserted in a deed by way of description must yield to lines marked and identified,[60] and where a grantor in making a deed for one acre calls for corners and a line which he himself has placed on the ground, with the location of which he is familiar, the lines and corners marked prevail over a call for quantity.[61]

III. CONTROL OF NATURAL MONUMENTS.

[§ 92.] **(A) General.**—The rules regarding the control of monuments are of such antiquity that they possess great strength, and inasmuch as a limited number of relatively modern decisions can be found on which calls for monuments are given supremacy over the control of intention as effectively expressed, it is important that the reasons for the control given monuments be fully understood, especially in regard to their dependence upon the physical properties of the objects referred to.

[§ 93.] **(B) Definition and Requisite Properties.**—Permanent objects such as streams or rivers or the shore of a lake, highways or other lands and buildings, or stakes when referred to in the description of property conveyed are known as monuments,[62] which are in general tangible landmarks established to indicate a boundary.[63] Objects, to be ranked as monuments must have certain physical properties such as visibility,[64] permanence and stability,[65] and

[59]Western Min. Mfg. Co. v. Peytona Cannel Coal Co., 8 W. Va. 406.

[60]Arms v. Owatonna, 117 Minn. 20, 134 N. W. 298.

[61]Petty v. Paggi Bros. Oil Co. (Tex. Civ. App.), 241 S. W. 574.

[62]Temple v. Benson, 213 Mass. 128, 100 N. E. 63.

[63]Whitcomb v. Milwaukie, 61 Ore. 292, 121 Pac. 432.

[64]Koch v. Gordon, 231 Mo. 645, 133 S. W. 609. See § 171, infra.

[65]Kidder v. Smith, 192 Mo. App. 205, 180 S. W. 1061.

definite location independent of measurements;[66] and if the ravages of time destroy these essential elements, the object may lose its dignity as a monument for that which has become displaced and unstable can no longer be employed to define boundary lines.[67] Nor can a monument no longer existent, whose location is in acknowledged doubt, control over inferior calls.[68]

[§ 94.] (C) **Classification.**—Monuments are regarded as natural and artificial, these terms being used in the ordinary sense of designating the works of nature and of man. However, in the consideration of the conflict of elements a more logical basis of classification is according to (1) visibility, (2) permanence, (3) stability, (4) certainty of identity, and (5) independence of measurements considered simultaneously. From this viewpoint certain of the monuments erected and placed by man deserve a high rating and may in city work be controlling. Thus a sidewalk placed on a street line is almost ideal as a monument in that it possesses the essential elements to a high degree, and for like reasons such structures as party walls,[69] well built, enduring fences,[70] highways and streets,[71] although the works of man, are classed as natural. Among the works of nature are streams, rivers, lakes, ponds, shores, beaches and trees.[72] Artificial monuments are objects of lesser stability and endurance, placed to mark points on the ground. They must be visible, of fixed location, capable of identification and possess a reasonable degree of permanence. Stakes have been rejected as artificial monuments because they

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[66]Guitar v. St. Clair, 238 Mo. 617, 142 S. W. 291.

[67]Kidder v. Smith, 192 Mo. App. 205, 180 S. W. 1061.

[68]McNichol v. Flynn, 167 App. Div. 646, 153 N. Y. S. 308. See § 100, infra.

[69]Medara v. Du Bois, 187 Pa. 431, 41 Atl. 322.

[70]Perich v. Maurer, 29 Cal. App. 293, 155 Pac. 471.

[71]Hoffman v. Port Huron, 102 Mich. 417, 60 N. W. 831.

[72]Miles Land Co. v. Hudson Coal Co., 246 Pa. 11, 91 Atl. 1061.

were considered unsubstantial,[73] but it has also been held that this applies only where there are no data in the description from which the location of the stake can be determined.[74]

[§ 95.] **(D) The General Rule.**—When monuments mentioned in a deed are identified they control both courses and distances given, whether they were seen by parties to the deed or not,[75] for the monuments erected upon the land are facts; the field notes and plat returned by the surveyor, indicating course and distance and quantity, are but descriptions, which serve to assist in ascertaining these facts.[76]

[§ 96.] **(E) Application.**—The force of this general rule is shown in Lyman v. Gedney[77] where a contract for sale conveyed the N ½ of N ½ of Lot Two Block Eleven, known as "C and G Block." Lot Two of Block Eleven was one hundred and fifty (150) feet north and south and eighty (80) feet east and west. The description therefore called for the north thirty-seven and one-half (37½) feet, while the building covered forty (40) feet. It was held that the building as a monument called for in the deed carried the grant to all land covered by it. Lewellen v. Williams[78] is a similar case in which the conveyance described the property thus: "Three story building of —— now occupied by grantor as a store and situated on land described as follows: Lot 1, Block 9, Village of ————." The store in fact covered all of Lot One and the west two feet of Lot Ten, and the court held that all land covered by the building was conveyed.

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[73]Cox v. Freedley, 33 Pa. 124, 75 Am. Dec. 584.

[74]Crowell v. Jones, 167 N. Car. 386, 83 S. E. 551.

[75]Williamson v. Pratt, 37 Cal. App. 363, 174 Pac. 114.

[76]McClintock v. Rogers, 11 Ill. 279.

[77]Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871. See Winters v. Bloom, 96 Kans. 443, 151 Pac. 1109 (§ 98, infra).

[78]14 Wis. 687.

[§ 97.] (F) **Exceptions.—(1) General.** — However, there is no magic in a monument which gives invariable control in cases of conflicting calls. It controls only because it is regarded as more certain than a given course and distance. If it should in a given case be less certain, the rule would fail with the reason for it, and the monument would yield to course and distance, and artificial monuments would yield more readily than natural ones.[79] The rule naturally does not apply when no call is made for the particular monument, for objects not called for in the deed can not be looked to as corners if in conflict with field notes.[80]

[§ 98.] (2) **Effect of Definite and Certain Description.**—A building as a monument will not control boundaries fixed by a definite and certain description, and the latter can not be enlarged by the use of the phrase "together with the buildings thereon standing," although the corners of such buildings are on adjoining lands.[81] This is illustrated in Winters v. Bloom[82] where the owner of a tract erected a building twenty-five (25) feet and two (2) inches wide on the west side. He afterward executed a deed conveying the west twenty-five (25) feet thereof to a grantee and subsequently conveyed the remaining eight (8) feet to another grantee. There were no exceptions, reservations or conflicting calls, nor were there any uncertainties in the descriptions. Whether the building extended two inches over the line of first grantee inadvertently or intentionally did not appear. In the absence of testimony showing that the grantor intended to convey more than was described in the deed of the first grantee or less than that described in

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[79]Heaton v. Hodges, 14 Maine 66, 30 Am. Dec. 731, cited in Thompson v. Hill, 137 Ga. 308, 73 S. E. 640.

[80]Hays v. Clawson (Tex. Civ. App.), 286 S. W. 857; Hamilton v. Blackburn, 43 Tex. Civ. App. 153, 95 S. W. 1094.

[81]Carville v. Hutchins, 73 Maine 227. See also Party Walls, §§ 146-150, infra.

[82]96 Kans. 443, 151 Pac. 1109.

the deed to the second grantee, or a showing of clear agreement or understanding of the parties that the east side of the wall of the building should be the true line of the division between the parties, it was held that each grantee took and owned the ground described in the conveyance made to him. It is interesting to contrast this case with Lyman v. Gedney and Lewellen v. Williams.[83]

In Winters v. Bloom the deed called for a piece of ground of definite and certain dimensions "together with the building standing thereon." This clause is more explanatory and embracing than locative or dimensional, and as phrased does not make a clear call for a monument. In Lewellen v. Williams the call of the deed was clearly for a certain building, and the reference to the lot, given as it was without dimensions, was clearly to aid in the identification of the building and to locate it. Therefore the building as a monument prevailed. In Lyman v. Gedney, although the call is clearly for a quarter of a certain lot, the dimensions can not be established without extrinsic aid, and the call for the block is such as to imply absolute coincidence. To all intents it states that the "C and G Block" covers the land to be conveyed.

[§ 99.] (3) **Effect of Evident Error.**—If following the calls for monuments includes land not owned by the grantor, and omits land in his possession, there are grounds for suspecting an error in the reference to the monument. Thus in Green v. Horn[84] an incorrect map showed a road bordering on the east of a lot to be conveyed. In writing the description the starting point was taken on the side of the road. In fact there was an irregular lot between the land in question and the road, so that when the courses and

[83]114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871 and 14 Wis. 687. (§ 96, supra).

[84]207 N. Y. 489, 101 N. E. 430, reversing 142 App. Div. 90, 126 N. Y. S. 486. See also Control of Adjoiners, § 169, infra.

distances were run from the road they did not fit the ground and failed to include any land whatever owned by the grantor. If applied by taking the starting point in his east line, the courses and distances were pertinent and closed with the east line of the grantor's lot as the last course. Under these circumstances the court held: "The rule that monuments control courses and distances is merely a rule of construction to ascertain the intention of the parties. If that intention is otherwise plainly manifested, it need not be ignored in blind adherence to such a rule."

Furthermore a call clearly erroneous will yield to one in keeping with the intention. A deed conveying a lot and the half of a double house standing thereon read as follows: "Beginning at the Post Road at southwest corner of Mrs. Ann Mitchell's land, thence northerly along west line of aforesaid Mitchell's lot 125 feet to a stone wall; thence westerly on said stone wall 29 feet to other lands of party of first part; thence southerly through center of a dwelling house parallel with the first mentioned line 125 feet to Post Road; thence easterly along said Post Road 29 feet to place of beginning, being lot 29 feet front and rear and 125 feet depth." The partition in the center of dwelling-house referred to was not parallel to the Mitchell line, the discrepancy being over a foot. The court held that it was the intention to convey to a line twenty-nine (29) feet from and parallel to the Mitchell line, and that the supposition that the partition was on the line was in error. The deed conveyed to the line parallel to and twenty-nine (29) feet from the Mitchell line, and gave an easement upon the premises west of the line so far as might be necessary to maintain the easterly house as it then was, which easement would not survive the removal of the house.[85]

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[85]Lawson v. Murden, 60 Misc. 163, 112 N. Y. S. 140.

[§ 100.] (4) **Effect of Destruction.**—"When that which is fixed and stable becomes displaced and unstable, it may no longer be employed in conveyances to define boundary lines"[86] and an uncertain monument must yield to course and distance. In McNichol v. Flynn[87] the original owner in 1886 deeded the first of two pieces to Wilson as follows: "Beginning at a point 135 feet 4 inches from the Southern Westchester turnpike (being the point to which the land conveyed to the McNichols extended), and running thence along said Washington avenue a distance of 115 feet." The deed also gave the abutters and mentioned the garden plot occupied by A. Arnold, a tenant of the grantor, as the boundary on the side which later became involved. In 1889 Townshend deeded the second piece describing it as "Beginning on the southwesterly side of Washington avenue, at the northeasterly boundary line of land now or late of John K. Wilson distant two hundred and fifty feet four inches more or less northwesterly from the corner formed by the intersection of the said southwesterly side of Washington avenue and the northwesterly side of Southern Westchester turnpike." McNichol who owned the corner

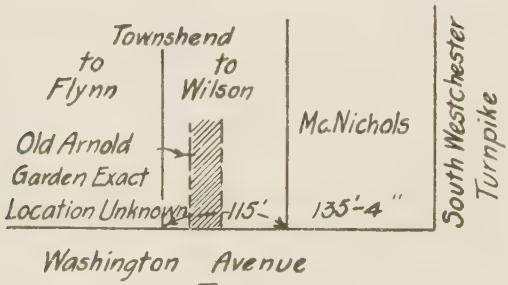

Fig. 12.

lot acquired the Wilson property, and a dispute arose concerning the line common with Flynn.

[86]Kidder v. Smith, 192 Mo. App. 205, 180 S. W. 1061.

[87]167 App. Div. 646, 153 N. Y. S. 308.

The Flynn deed clearly called for a point in Washington Avenue in the northeasterly Wilson boundary and gave a distance from the southern Westchester Turnpike which established it as the line given in the prior Wilson deed. To maintain his claim Flynn relied on the call for the A. Arnold garden plat as an adjoiner of the Wilson plat, and in so doing depended upon a weakness in the Wilson deed rather than strength in his own. It was clearly established that a fence marking the Arnold garden was considerably nearer the southern Westchester Turnpike than the line called for in both the Wilson and Flynn deeds, but it was impossible to ascertain even approximately where it was. Under these circumstances the fence which had lost its location was of no avail to the court in making its decision, and course and distance established the line because of its superior certainty. "If monuments once existing are gone, and the place where they originally stood can not be ascertained and located with precision, the courses and distances, when explicit, must govern."[88]

[§ 101.] (G) The Line of an Adjoiner as a Monument.—(1) The Rule.—"A call for the line of another tract of land is a natural boundary,"[88a] and when one accepts a deed bounding him by another's land, the land referred to becomes a monument,[89] for "in this connection a boundary line of a named adjoiner is a fixed natural object."[90]

[§ 101.1.] (2) Effect.—The rule as above stated merely establishes the call for the line of an adjoiner as a monument, and in no wise dictates the control it possesses as such. Evidence as to "whether there was a known line, and which line is the line meant and understood by the parties, the facts that the line was marked or unmarked,

[88]Drew v. Swift, 46 N. Y. 204, quoted in McNichol v. Flynn, 167 App. Div. 646, 153 N. Y. S. 308.

[88a]Cherry v. Slade, 7 N. Car. 82.

[89]Bryant v. Maine Cent. R. Co., 79 Maine 312, 9 Atl. 736.

[90]Fidelity Realty Co. v. Flahaven Land Co., 193 Ky. 355, 236 S. W. 260.

that the corners were or were not previously identified, that the owner claimed up to a particular line as his, or that there was no previous claim or reputation, are most material."[91] The control of monuments is absolutely dependent upon the certainty of identification, permanence and stability, surety of its location independent of measurements, and visibility. The dignity to be accorded the call for a line of an adjoiner as a monument is tested by the same criteria.

[§ 102.] (3) **Application.**—It is absolutely essential to test these necessary qualifications before giving the line of an adjoiner control as a monument. It is for this reason that the statement of the rule by the Massachusetts court as found in Van Ness v. Boinay,[92] where it was held "even in the absence of a wall or visible boundary marking this line of the adjoining proprietor, such line is of itself a monument and controls the distances given," is entirely too broad. The call for the line of another is obviously not so decisive as a call for a natural monument, and the mind may be under the perfect conviction from other circumstances that the mistake is not in course and distance, but in supposing that the other had a line at the end of the course and distance. If that conviction exists there ought to be no deviation from course and distance.[93] The safest precedents in the application of the rule are found in Maddox v. Fenner[94] and several later Texas decisions[95] where it is recognized that a call for a line of an adjoiner is a call

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[91]Carson v. Burnett, 1 Dev. & Bat. 153, 30 Am. Dec. 143.

[92]214 Mass. 340, 101 N. E. 979. See also Percival v. Chase, 182 Mass. 371, 65 N. E. 800; Pickman v. Trinity Church, 123 Mass. 1, 25 Am. Rep. 1; § 212, infra.

[93]Carson v. Burnett, 1 Dev. & Bat. 153, 30 Am. Dec. 143.

See also Jones v. Hamilton, 137 Ky. 253, 270, 125 S. W. 695; Fincannon v. Sudderth, 140 N. Car. 246, 52 S. E. 579.

[94]Maddox v. Fenner, 79 Tex. 279, 15 S. W. 237.

[95]Hermann v. Thomas (Tex. Civ. App.), 168 S. W. 1037. See also Control of Adjoiners Section 180.

for a monument, and that the control to be given is dependent upon the circumstances of the particular case.

[§ 103.] (H) Over Artificial Monuments.—(1) The Rule.—Natural monuments which are incapable of being moved or mistaken are always preferred to artificial monuments.[96] The basis of the rule is found in the considerations which fix the classification of monuments.[97] In general, natural monuments prevail because they possess to a greater degree the qualifications which give monuments control over other calls, and in certain instances, because of the impossibility of placing artificial objects at predetermined points.[98]

[§ 104.] (2) Application.—Where stakes or pipes are driven on a river bank so as to include the area called for by metes and bounds, and a natural boundary such as a stream or highway is called for as boundary, the grant carries to the highway or river, for it is not always feasible to drive stakes on the bank of a river or in the center of a highway, and therefore it should not be taken as establishing an intention directly contrary to the call for a natural boundary.[99]

In Cox v. Freedley[1] the deed involved read "along southeast side of Egypt St." and along the northeast side of Race Street, and the courses and distances carried the grant to stakes on the side lines of the streets. The court in rendering its decision commented at great length upon the consideration of highways and streets as boundaries and recognized that the grantor could retain fee in the highway if he so desired, but held that no such intention was expressed in the deed, and inasmuch as it was not always feasible to

[96]Kimball v. McKee, 149 Cal. 435, 86 Pac. 1089.

[97]See § 94, supra.

[98]See § 104, following.

[99]Hennigan v. Mathews, 79 Ore. 622, 155 Pac. 169. See Spinning v. Pugh, 65 Wash. 490, 118 Pac. 635.

[1]33 Pa. 124, 75 Am. Dec. 584.

drive stakes in the center of the road where they were subject to disturbance, the grant carried to the center line. A lower court had previously held otherwise on the grounds that the call for the side lines clearly expressed an intention on the part of the grantor to retain the fee in the highway. This variance of opinion suggests the importance of making the expressed intention certain and not dependent upon implication, for at the best the decision of the higher court might well be questioned in regard to this point. If, however, the highway and not a side thereof is called for as boundary, there is no question but what the grant would extend to the center line rather than to stakes at the side, provided of course the grantor had fee in the highway.[2]

[§ 105.] (3) **Exceptions.**—A natural monument will not prevail over an artificial one where it is clear that the parties concerned intended otherwise, and in preparing the conveyance, actually used the artificial monument and not the natural one. Thus in Stefanick v. Fortuna[3] a stone monument described as in the north line of Hoosac Street but in fact one and a half feet to the north of the street line prevailed because it was actually used, and thus acquired control of the street line which would ordinarily be given superior rank.

[§ 106.] (J) **Over Plats and Maps.—(1) The Rule.** —The calls of a plat stand on the same footing as calls expressed in words and yield just as readily to natural monuments mentioned in conveyances or indicated as bounds on the map. This is true because a plat is merely a representation on paper of an actual location upon the ground, and a

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[2]See §§ 230-247; Dean v. Lowell, 135 Mass. 55; Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33.

[3]222 Mass. 83, 109 N. E. 878.

graphic means of making a description too involved for written expression.[4]

[§ 107.] (2) **Applications.**—In Wheatley v. San Pedro, L. A. &c. R. Co.[5] a long series of conveyances and several partition decrees had described a boundary in question as follows: "From the said point B unto a stake marked 'C' following the ordinary high-water mark, and distant in a straight line one thousand six hundred and nineteen yards and three inches, with the course by compass east 47° north." A certain map referred to in a final

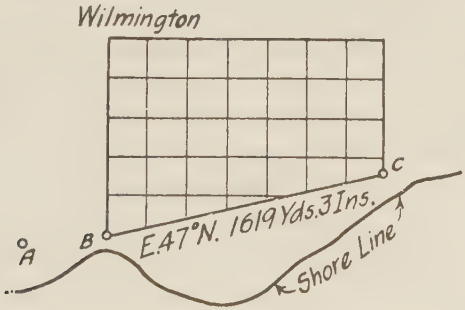

Fig. 13.

partition showed the interior block lines as ending at the line BC, but this was offset by the fact that the decree, in allotting the blocks, extended the said lines past BC to highwater as follows: "Extending its east and west lines to ordinary high water." Immediately after this decree a plat was recorded showing these block lines as extending to highwater, and the city of Wilmington had on several occasions recognized the line BC as running along ordinary high water. The court held where the deeds and partition decrees define the line BC as following ordinary high water, the statement following that C is distant from B so

[4]Allott v. Wilmington Light &c. Co., 288 Ill. 541, 123 N. E. 731; Wheeler v. Benjamin, 136 Cal. 51, 68 Pac. 313. See § 80, supra.

[5]169 Cal. 505, 147 Pac. 135.

many yards in a straight line merely fixes the location of C more definitely and does not limit the previous description.

[§ 108.] (3) **Effect of Conflict.**—Not only do natural monuments prevail over plats in questions of interpretation, but the rule also holds when there is actual conflict. Thus in Weinheimer v. Ross[6] the actual location of a certain street laid out prior to the transaction differed 3½ feet from that indicated on the Davy map referred to in the deed. The court held that the parties to the deal contemplated the actual street as laid out, the grantee presuming to buy a corner lot entirely without the street lines, and that both believed the street as shown on the map was in agreement with the actual street on the ground, and therefore the street as a monument prevailed over the plat. The same point is further illustrated in Arms v. Owatonna[7] where a stone monument located on the southwest corner of the lot in question and identified beyond all doubt indicated the street to be fifty (50) feet wide and prevailed over a dimension of forty (40) feet given in the plat.

[§ 109.] (4) **Exceptions.—(a) Effect of Intention.**—When the circumstances indicate that the rule can not be applied to ascertain the intentions of the parties, exceptions must be made. The case of Reid v. Klein[8] is a decided contrast to that of Weinheimer v. Ross. In the latter the street as located prevailed because the error was most likely in assuming the map to be a correct representation of a visible street. In the former the circumstances indicated that the plat location was undoubtedly intended. The question arose in regard to a beginning point described as follows: "On line dividing northeast one quarter of section 15 —— at a point ranging in south line of Adams Street

[6] 80 Misc. 269, 141 N. Y. S. 55. See also § 256, infra.

[7] 117 Minn. 20, 134 N. W. 298.

[8] 138 Ind. 484, 37 N. E. 967.

Muncie." Adams Street was an old street running east and west through Muncie, forty-five (45) feet wide and until about a year prior to the conveyance quoted from above, had its eastern terminus at Madison Street. A subdivision had been staked out to the east and the city line moved about twelve hundred (1200) feet east to Hackley Street. The map of this addition had been recorded, and the extension of Adams Street was dimensioned as sixty (60) feet. At the time of the transaction the addition had not been opened up, and there was nothing to indicate the location or width of Adams Street to the east of Madison Street. No survey was made prior to the deed, and it would have been extremely difficult for the parties to fix the point in the field "ranging in south line of Adams Street." Considering these facts and that the grantor contemplated continuing Adams Street eastward through his subdivision, the court held that the deed must have actually been written with the plat in mind, and therefore to ascertain the intention the plat prevailed over Adams Street to the west of Madison Street as a monument.

[§ 110.] (b) Necessity of Call for Monument.—The particular circumstances pertaining to a given case and whether or not there is a distinct call for a natural monument to prevail over the lines of the plat play a most important part. Thus the case of Spinning v. Pugh[9] stands out in contrast to those previously considered[10] in that the deeds involved made no call for the natural monument (Puyallup River) as a boundary. Furthermore it is distinguished from Nicolin v. Schneiderhan[11] and Oregon Home Builders v. Eisman[12] in that in these the lines of the plats

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[9]65 Wash. 490, 118 Pac. 635.

[10]See Hennigan v. Mathews, 79 Ore. 622, 155 Pac. 169 (§ 104, supra); Wheatley v. San Pedro, L. A. &c. R. Co., 169 Cal. 505, 147 Pac. 135 (§ 107, supra).

[11]137 Minn. 63, 33 N. W. 33 (§ 163, infra).

[12]88 Ore. 611, 172 Pac. 114 (§ 164, infra).

were continued to intersect the natural monument and thus established it as an adjoiner to control the calls for distance as given on the plats, whereas in Spinning v. Pugh the sides of the blocks stopped at a line varying in distance from the Puyallup River from eight (8) to one hundred and fifty (150) feet, leaving an unplatted area which was in controversy. Pugh who claimed the portion of this strip between his north line and the south bank of the river, laid great stress upon a statement in the dedication on the plat to the effect that *all* the government lots in which the blocks were located were platted. The court held that this was irrevelant, for the question of the dedication of the land in controversy was not before it, and the use of the word "all" in no wise enlarged the size of the blocks as given in the plat. The deed out of Spinning to which Pugh traced title described the land by the metes and bounds as set forth on the plat, but made no mention of the river as a boundary. Therefore the land was limited to the lot as pictured in the plat and staked on the ground, for there was no call either in the deed, or to be inferred from the plat establishing the river as a boundary.

[§ 111.] (K) **Over Course and Distance.—(1) The Rule.**—"No rule in real-estate law is more inflexible than that monuments control course and distance, * * *. The city surveyor should therefore have directed his attention to the ascertainment of the actual location of the original landmarks * * *. As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are."[13]

In the final analysis the rigidity of the rule, due to the greater certainty and correctness usually found in monu-

[13]Bullard v. Kempff, 119 Cal. 9, 50 Pac. 780.

ments, is relative and ceases when the application defeats the intention of the conveyance under consideration. The rule authorizes no other departure from course and distance than is necessary to effectuate the apparent intention.[14]

[§ 112.] (2) Application.—(a) As Guide to Intention.— In the application of this or any rule the purpose should be to utilize it as a guide to ascertaining the intention. When used in this manner and substantiated by evidence it may overcome absolutely certain calls in the deed as the case in Holden v. Crolly.[15] The contract for sale to Crolly called for the western boundary to be line of right of way thirty (30) feet more or less wide in line of Wheeler Avenue, but when

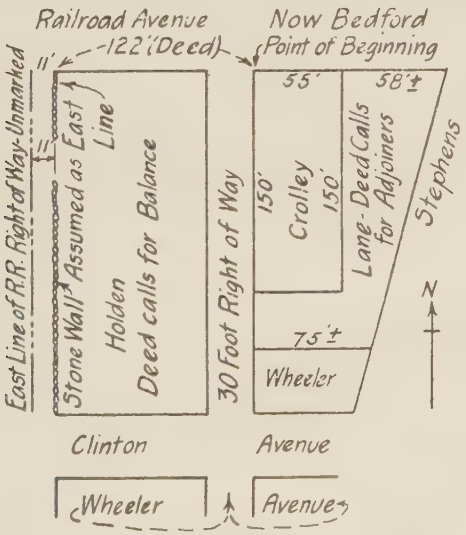

Fig. 14

the deed was written this line was called for as one hundred and twenty-two (122) feet from easterly line of the right of way of a certain railroad which was taken as a stone wall.

[14]Talifer Co. v. Falk, 105 Misc. 6, 173 N. Y. S. 251.

[15]153 App. Div. 254, 138 N. Y. S. 23.

Buildings on the Crolly lot were shortly after erected according to the lines as established from the stone wall. Subsequently it was learned that the true east side of the right of way was eleven (11) feet west of the wall from which measurements were actually made, and Crolly claimed to a line one hundred and twenty-two (122) feet from the correct east side of the right of way upon the principle that when land conveyed is described as bounded by land of another, it must be taken that it is the true line that divides them and not the line of occupation.[16] This moved his east line eleven (11) feet west and into his building and also threw the thirty (30) foot right of way out of line with Wheeler Avenue as called for in the agreement of sale. Under these circumstances the unmarked right of way in line with Wheeler Avenue constituted the west line of the Crolly grant, and the distance from the east line of the railroad right of way became one hundred and thirty-three (133) feet, for everything indicated this to have been the intention of the parties as evidenced by their actions at the time of the transaction.

[§ 113.] (b) To Give Control to Certainty and To Harmonize Deeds.—Another interesting application of the rule complicated somewhat by other considerations is found in Birk v. Hodgkins.[17] The properties of the parties to the action covered the entire block which originally was owned by Victor Beaudry. The Hodgkins lot was deeded out first and described as follows: "Commencing at a point at the intersection of Courthouse street and Flower street, thence N 52°-50′ W 253.84 feet to intersection of Courthouse and Pearl Sts. * * * ; thence along the easterly side of Pearl St. S 57° 12′ W 217.28 feet to an angle in the east side of Pearl St.; thence along said Pearl St. S 37° 27′ W 292.02

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[16]Smith v. Vermont Marble Co., 99 Vt. 384, 133 Atl. 355.

[17]159 Cal. 576, 114 Pac. 822.

feet to a point at the intersection of Pearl and First Streets, thence along the northerly line of First St. S 52° 47′ E 163.28 feet to a point in the northerly line of First St., thence N 37° 21′ E 120 feet to a point; thence S 52° 47′ E 165 feet to a point in westerly line of Flower Street; thence along said westerly line of Flower St. N 37° 21′ E 376.19 feet to place of beginning."

A few months later the second conveyance out of Beaudry describing the Birk lot was made as follows: "Commencing at the northwesterly corner of First and Flower Sts. at the intersection of the westerly line of Flower with the northerly line of First St.; thence N 37° 30′ E 120 feet to a point; thence N 52° 30′ W 165 feet to a point; thence S 37° 30′ W 120 feet to a point, thence S 52° 30′ E 165 feet to place of beginning."

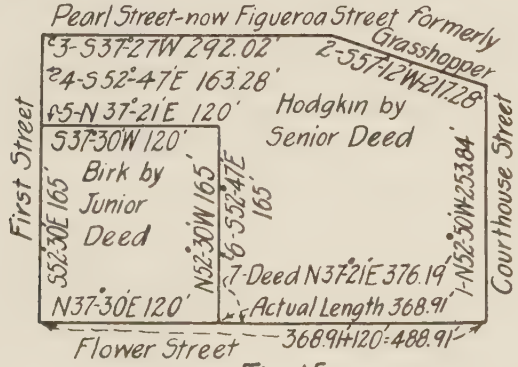

Fig. 15

These two deeds together call for four hundred ninety-six and nineteen one hundredths (496.19) feet on Flower Street, and as there was but four hundred eighty-eight and ninety-one one hundredths (488.91) feet available, and as Hodgkins took all called for in his deed, Birk naturally objected to the shortage of approximately seven (7) feet. Hodgkins claimed that as he had the senior title which should be con-

strued most favorably for the grantee, that Beaudry, the original grantor, did not have one hundred and twenty (120) feet on Flower to deed to Birk's predecessor in title. To substantiate this claim and produce the effect contended by Hodgkins it is necessary to reverse the order of the calls and lay off the last course first. The court held that this was unnecessary and that the deeds could be given the intended effect by following the footsteps of the surveyor if the streets, as monuments were given control over course and distance. The proper survey was held to begin at the corner of Flower and Courthouse streets and follow along the lines of the streets called for in the proper order, regardless of distance until the corner of First and Pearl streets was reached, then to measure one hundred and sixty-three and twenty-eight one hundredths (163.28) feet along the side line of First Street and establish a point; then to take course and distance to reach the point in Flower Street one hundred and twenty (120) feet from the line of First Street and let the closing line along Flower Street take the shortage. In effect this survey follows all the street lines called for as monuments regardless of course and distance and leaves the Birk lot one hundred and twenty (120) feet by one hundred and sixty-five (165) feet as called for in both deeds. The streets as monuments reconcile the discrepancies resulting from the consideration of the courses and distances and cause no conflict in the intention of the two deeds.

[§ 114.] (3) **Considerations Essential to Render Rule Operative.**—The first condition necessary for the application of the rule giving a monument control over course and distance is that the object be called for in the deed.[18] It is also essential that the monuments relied upon be iden-

[18]Hays v. Clauson (Tex. Civ. App.), 286 S. W. 857; Crandall v. Mary, 67 Ore. 18, 135 Pac. 188.

tified with reasonable certainty,[19] and that their location likewise be reasonably definite,[20] or their location admitted,[21] for where "monuments do not agree with courses and distances, the evidence of their actual location should

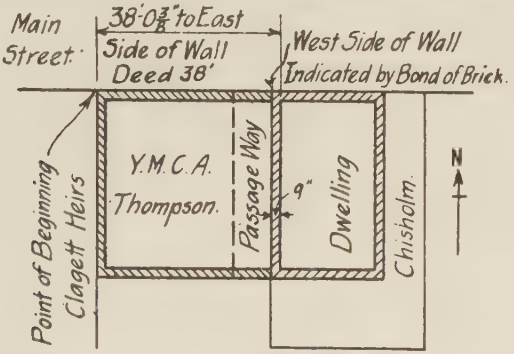

Fig. 16.

be so clear and satisfactory as to—place beyond question the actual location of the line or monument,"[22] and in this connection courses and distances should not be disregarded in determining the identity of monuments claimed to have been found with those referred to in the deed.[23] However, it is only necessary that a clear and certain call be made in the deed, and the location and identity may be proved by testimony not found in the grant but consistent with it.[24]

[§ 115.] (4) Course and Distance as an Aid to Identity.—The manner in which course and distance may clarify the intention of a call for a monument is well illustrated in Chisholm v. Thompson.[25] In 1821 the orig-

[19]Carter v. Collins (Tex. Civ. App.), 192 S. W. 316.

[20]Darlington v. Lane, 46 App. D. C. 465.

[21]Hoge v. Lee, 184 N. Car. 44, 113 S. E. 776.

[22]Albert v. Salem, 39 Ore. 466, 65 Pac. 1068, 66 Pac. 233, citing Bean, J.; King v. Brigham, 19 Ore. 560, 25 Pac. 150.

[23]Tyler v. Fickett, 73 Maine 410. See §§ 132, 186, infra.

[24]Blake v. Doherty, 5 Wheat., 18 U. S. 359, 5 L. ed. 109.

[25]233 Pa. 181, 82 Atl. 67.

inal grantor of the two properties in dispute built a house on the eastern portion of his property as indicated in the sketch. Eleven years later he built a store two stories high on the western half, utilizing the west wall of the residence as a party wall. In 1852 another story was added to the store, and the wall of the dwelling raised accordingly. The Y. M. C. A. bought the store property in 1890 and the conveyance described it as beginning at the point noted and "running along Main St. 38 feet more or less to corner of house lately used as a dwelling—having erected thereon a three story brick store." Three years later Chisholm acquired the eastern portion of the lot described as follows: "All that certain lot of ground situated on the south side of Main St. bounded on the east by lot of John S. Harah, and on the west by lot of Y. M. C. A. being the same property heretofore used as a dwelling." In 1907 the Y. M. C. A. sold its property to Thompson, and the question arose as to the ownership of the land occupied by the party wall. It should be noted that at the end of the front wall of the store on the side near the dwelling there was an old doorway which had been bricked up without bonding the bricks into the party wall, so that the west side of the party wall was clearly visible, and could easily have been used for purposes of measurement. The distance thirty-eight feet from the acknowledged point of beginning extended past this crack nearly nine inches, or to within three-eighths of an inch of the east side of the party wall. Under these circumstances the natural inference was that the parties had allowed for all the wall in question and had intended it to be included with the store property. In other words the distance established the wall as being included in the store rather than in the dwelling.

[§ 116.] (5) Exceptions—(a) Necessity of Call.—As pointed out in Powers v. Jackson[26] monuments not referred to in a deed will not control course and distance. The same question arose in McKinney v. Doane[27] where both parties had taken possession of adjacent lots by deeds describing them by lot number and referring to a recorded plan of the subdivision. It was agreed that the reference to the plat established it as a part of the deed and that the dimensions upon it, therefore, became the courses and distances of the conveyance. There was nothing on the plat to indicate the position of any stakes at the corners of the lots, and a survey of the plaintiff's lot had been made taking the plat dimension as given and starting from a section line as a basis. The defendant when improving his lot tore down a fence built by the plaintiff and extended his building over the old fence line to one which he claimed marked the dividing line in the original survey. The plaintiff brought suit to eject the defendant, and the decision rested upon the control of the courses and distances of the plat over certain monuments not mentioned in the deeds or recognized by the parties at the time of the transaction, but supposedly marking the original lot lines. The lower court declared the law on this point to be that where one has purchased a certain lot or tract of land without notice of the actual boundaries or corners, he has a right to rely upon what appears from the original recorded plat thereof, to which the deed refers, and is not bound by monuments which do not appear from said plat or from the deed, or from mesne conveyances to have been placed upon the ground, unless the monuments are actually upon the land or he knows them. The higher court repeated this ruling and held that it was not in conflict with the general rule that monuments called for in a plat or survey control course

[26]50 Cal. 429. See § 83, supra. [27]155 Mo. 287, 56 S. W. 304.

and distance, if their location can be definitely ascertained, although they may be removed, destroyed, or decayed, for in this case there was no call for monuments.

[§ 117.] **(b) Effect of Intention.**—"It is the general rule that in cases of conflict monuments prevail over courses and distances; but such rule, designed only to aid in ascertaining the land which the parties intended to convey, is not without exceptions."[28] "It is founded upon the presumed intention of the parties, to be gathered from the language contained in the grant, and upon the assumption that the description by monuments approaches accuracy within reasonable distance, and places the monument near where it really exists."[29] Therefore, the control of monuments over course and distance ceases when its application defeats the expressed intention of the parties. Thus in Higginbotham v. Stoddard[30] a deed described the property as "being 10 feet on Madison St., 32 feet in rear on northerly side of the millrace and 100 feet in depth from front to rear containing 2100 Sq. feet of ground." The northerly side of the millrace was more than one hundred (100) feet from Madison Street but the court held that the distance prevailed because it carried out the intention of the parties as confirmed by the area. Alone, either would have yielded to a natural monument, but together in perfect agreement they expressed the intention and controlled.

[§ 118.] **(c) Effect of Evident Error.**—"The reason why monuments, as a general thing, * * * control * * * is, that they are less liable to mistakes; but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all other particulars in the deed that they were

[28]Conkling Min. Co. v. Silver King Coalition Mines Co., 230 Fed. 553.

[29]Security Land & Exp. Co. v. Burns, 193 U. S. 167, 48 L. ed. 662, 24 Sup. Ct. 425.

[30]72 N. Y. 94.

inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant. * * * "It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify the land and render certain what the sheriff intends to convey, it would certainly be absurd to retain the false call, and thus defeat the conveyance."[31] Thus in Davis v. Rainsford[32] the grant for a small piece of land called for a line starting at a wall and running fifteen inches to the line of an adjoiner which was in fact three feet, six inches from the wall. The short distance eliminates the possibility of error of over one hundred per cent., and it is a certainty that the mistake is in the call for the adjoiner. This conclusion is confirmed by the fact that improvements made shortly after the conveyance recognized the line as established by distance.

[§ 119.] (d) Effect of Local Conditions.—"The rule * * * is usually applied in fuller force to large boundaries of land in the country, where mistakes in the use of a surveyor's chain may easily occur, and with less potency to land in town or cities. This for a manifest reason: 'Where the lines are so short as evidently to be susceptible of entire accuracy in their measurement, and are defined in such a manner as to indicate an exercise of care in describing the premises, such a description is regarded with great confidence as a means of ascertaining what is intended to be conveyed. White v. Lunning, 93 U. S. 514, 23 L. ed. 938.' "[33] Furthermore the greater value of urban property

[31] White v. Luning, 3 Otto (93 U. S.) 514, 23 L. ed. 938.

[32] 17 Mass. 207.

[33] Pritchard v. Reborl, 135 Tenn. 328, 186 S. W. 121, quoting Higueras v. United States, 5 Wall. (U. S.) 827, 835. See also White v. Luning, 93 U. S. 514, 23 L. ed. 938, which supports the exceptions to the general rule (see §§ 152, 169), and was erroneously referred to by the judge in Pritchard v. Reborl.

permits the expenditure of more care and warrants increased accuracy. Frontage and depth are important factors in planning for improvements, and distances are of great significance.

[§ 120.] (e) **Effect of Relative Certainty.**—Where a monument relied upon has lost its identity and location because of deterioration,[34] is invisible and therefore indefinite and uncertain, or the call is made upon conjecture, the reason for its invariable control is lacking, and the relative certainty of the conflicting calls establishes the precedence. Thus in Batavia, N. Y.,[35] a traction company acquired a

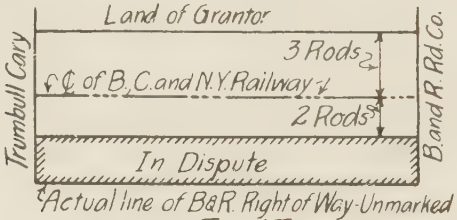

Fig. 17.

strip for a right of way originally deeded to the Buffalo, Corning & New York Railway described as follows: bounded on the easterly end by lands of B., C. & N. Y. Ry. Co. on the westerly end by lands of Trumbull Cary, on the north side by lands of grantor and on the south side by said B. & R. Railroad Co., and being 140 feet in length as measured on said center line of railroad of grantees as now located and hereby intended to convey 3 rods in width at the north side and 2 rods in width at the south side of the same. In fact the right of way of the B. & R. Railroad Co. mentioned as the south abutter was more than two (2) rods from the center line as located, and suit was in-

[34]See McNichol v. Flynn, 167 App. Div. 646, 153 N. Y. S. 308 (§ 100, supra).

[35]Buffalo, N. Y. &c. R. Co. v. Stigeler, 61 N. Y. 348.

stituted to establish title to the intervening land. The court held that it remained in the grantor, for the north line of the right of way was not delineated on the ground, whereas the center line of the traction company was marked by stakes, and definite measurements from them prevailed over the unmarked line. In reality the call for the adjoiner was made upon conjecture, and any monument called for in such a manner must of necessity yield to course and distance actually measured and certain.

[§ 121.] (L) Over Quantity.—A consideration of the propogation of error establishes at once the unreliability of area as an accurate guide to the intention of the parties in a transaction. Furthermore as previously mentioned, area is difficult to estimate and often is not of great significance. Ordinarily it is inserted in a description incidentally and often properly qualified as more or less. Under these circumstances it invariably yields to natural or permanent objects called for[36] unless it is made the very essence of the contract and established as such in the deed.

[§ 122.] (M) Control as Between Several Monuments. —(1) The Rule.—When there is conflict between monuments, that which is most certain, least likely to mistake, and in keeping with the expressed intention will prevail,[37] and if one of the monuments in conflict can not be found, this circumstance in itself is suggestive of an error in the call for it, and the other will control.[38] Likewise where one of the conflicting monuments is in agreement with other monuments or the courses and distances of a plat or deed and the other is not, the harmony at once establishes the control.

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[36]Beattie v. Garrison, 204 App. Div. 335, 198 N. Y. S. 71.

[37]Hubbard v. Dusy, 80 Cal. 281, 22 Pac. 214. See Stefanick v. Fortona, 222 Mass. 83, 109 N. E. 878 (§ 78 supra).

[38]Lance v. Rumbough, 150 N. Car. 19, 63 S. E. 357.

[§ 123.] (2) **Application.—(a) Survey from Original Corners.**—Thus in Bailey v. Hipple[39] surveys from monuments known to be established as corners of the original survey made the lot in question fifty feet deep, and an alley to the rear twenty feet wide as shown on the plat. Surveys based on the center line of Main Street which had not been extended into the subdivision when the addition was platted, made the lot in question fifty-six (56) feet deep and the alley correspondingly narrower. Inasmuch as Main Street was nonexistent at the time of the original survey, and did not harmonize with the plat, it yielded as a monument to the stakes.

[§ 124.] **(b) Effect of Purpose of Monument.**—The service that a monument in question renders may suggest the intended control. Thus where a river or highway is in conflict with calls for stakes on the bank or side, the fact that the stakes are necessary to define the terminals of the boundary at once establishes that the line of the natural monument is intended, rather than the straight line connecting the terminals.[40]

[§ 125.] **(c) Courses and Distances as Aids.**—In case of doubt as to which of two or more natural objects of the same kind is the one called for in the deed, the courses and distances may be used as a guide to determine which is meant.[41] Thus in Zeibold v. Foster[42] the relocation of a road was described as follows: "Commencing at a point on said G. W. Sappington Road 105 feet north of the southwest corner of the northeast quarter of the southwest quarter of section 24, * * * running thence south 46 degrees, east 92½ feet; thence 42 feet south, to the line of the quarter

[39]95 Kans. 515, 148 Pac. 606.

[40]See Wheatley v. San Pedro, L. A. &c. R. Co., 169 Cal. 505, 147 Pac. 135 (§ 107 supra); Cox v. Friedley, 33 Pa. 124, 75 Am. Dec. 584 (§ 104 supra).

[41]Doe v. Paine, 4 Hawks (11 N. Car.) 64, 15 Am. Dec. 507.

[42]118 Mo. 349, 24 S. W. 155.

section aforesaid, to a point 66 feet east of the southwest corner of said quarter section; thence south to a distance about 16 feet, to the Moreau Church road." As indicated

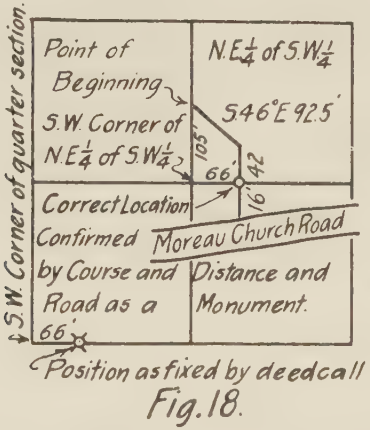

Fig. 18.

on the sketch the confusion arises in the termination of the second course which is given in the description as in the south line of the quarter section sixty-six (66) feet from the southwest corner. Running out the course and distance it is very evident that the error is in the call for the south line of the quarter section as a monument, and inasmuch as the Moreau Church Road is in fact sixteen (16) feet south of the south line of the N. E. ¼ of the S. W. ¼ it is further evident that it was intended to call for the south line and southwest corner of the N. E. ¼ of the S. W. ¼ in fixing the terminal of the second course. Therefore one of the monuments, the road, and course and distance are in perfect harmony, and together prevail over the incorrect call.

[§ 126.] (d) **No Call For One Monument.**—A monument not called for in the deed obviously must yield to those recognized by the grant. Thus in Clark v. Baird[43] an inter-

[43] 9 N. Y. 183, 1 Seld. Notes 187.

esting conflict arose from incorporating in the deed description different monuments from those pointed out in the actual location prior to the survey. A certain group of trees and the bank of a stream were pointed out as the limits of the property, but when making the survey they were not run to because of the physical difficulties involved. The grantee was present and knew this, but when the deed was delivered was fully aware that the description used in it called for the monuments of the survey and not those pointed out. The court held that the grant was limited to the monuments of the deed, for otherwise the land in dispute would be conveyed solely by parol.

IV. CONTROL OF ARTIFICIAL MONUMENTS.

[§ 129.] **(A) General.**—Strictly speaking, natural monuments are confined to the works of nature and artificial monuments are the works of man. In practice certain monuments such as highways and building walls are generally recognized as possessing the properties of natural monuments; that is, permanence, identity and visibility. Other monuments placed by man may possess certain of the essential properties to a greater degree than many natural monuments, and yet may lack in one particular to such an extent that they can not be regarded with great confidence. It is therefore hard to draw any distinct dividing line between the two classes of monuments, or to decide whether or not a certain object is distinctive and permanent enough to be regarded as a monument. In many of the cases previously considered the monuments referred to were on the border line and might be regarded for purposes of control as either natural or artificial, according to the judgment of those making the decision.

[§ 130.] **(B) Stakes as Artificial Monuments.—(1) General.**—By definition a monument is some tangible land-

mark established to indicate a boundary,[44] and it is questionable whether or not wooden stakes meet all the requirements usually associated with a landmark, permanency especially. In Bast v. Mason[45] it was held that wooden stakes about one inch square, driven at corners of lots did not constitute permanent monuments. This was cited in Cox v. Freedley[46] supporting this contention. On the other hand in Thatcher v. Matthews[47] it was held that where a stake is placed to locate the corner of a survey, the stake fixes the corner as conclusively as if the corner was marked by a permanent object. These citations establish that it is impossible to give a hard and fast rule which will determine the regard to be given a stake based on the considerations of its physical properties such as size, material, etc.; and further investigation of these cases reveals that when the problem is viewed as one regarding the control of intention, much of the apparent conflict is removed. Thus in Bast v. Mason[48] the rejected stakes had been set up by an auctioneer just prior to a sale and yielded to a fence long recognized as a boundary. Under these circumstances the decision is not in the least arbitrary and illustrates how the surrounding circumstances as well as the physical properties of the stakes enter into a decision.

[§ 131.] (2) **Identity an Important Factor.**—In a boundary location, calls for natural or artificial objects prevail only when they can be identified with reasonable certainty,[49] and from a practical standpoint the question of identity may be particularly troublesome in the case of stakes. In Resurrection Gold Mining Co. v. Fortune Gold Mining Co.[50] the court ruled that a round stake, four inches

[44]Per Moore (J) Whitcomb v. Milwaukie, 61 Ore. 292, 121 Pac. 432.

[45]165 Mo. App. 718, 148 S. W. 398.

[46]33 Pa. 124, 75 Am. Dec. 584.

[47]101 Tex. 122, 105 S. W. 317.

[48]165 Mo. App. 718, 148 S. W. 398.

[49]Carter v. Collins (Tex. Civ. App.), 192 S. W. 316.

[50]129 Fed. 668.

in diameter set loosely six inches in the ground between two convenient reference points within four feet of it, with two blazes upon it and an inscription with a lead pencil of the figures 3-2309 on the latter blaze, does not fill the description of a post four inches square, with the figures 3-2309 cut into it, set firmly on the ground, where no reference points are available. However, this represents a rather extraordinary situation and questions of identity usually arise because of lack of definition rather than conflict between the description and the stake found.

In small cities and towns stakes and small pipes are often depended upon to mark boundaries, and these all look alike. Some have been placed by surveyors, some driven near a stake but far enough off not to disturb it, and others by property owners according to measurements made with cloth tapes, ten foot sticks, etc. Certain of the pipes will check deed measurements and are in perfect line; others are varying amounts off, and it is difficult to adjust a survey to all the landmarks. Usually it is impossible to turn angles from lines established from such pipes and obtain rational results. Many stakes may be eliminated as monuments because the deeds involved do not call for them[51] but at the best the situation calls for the greatest discretion, and experience is the only guide. It is good practice in any event to run out the survey by deed distances from monumented street lines and adjust later if necessary, noting on the plat all pipes found and indicating a reason for whatever irregularities are noted.

[§ 132.] (3) **Identity Aided by Evidence.**—The courts recognize that much latitude must be allowed in the proof of ancient boundaries,[52] and therefore evidence locating the

[51]Temple v. Benson, 213 Mass. 128, 100 N. E. 63; Keefer v. Jamison (Tex. Civ. App.), 199 S. W. 490.

[52]Busbee v. Thomas, 175 Ala. 423, 57 So. 587.

position of a monument no longer existing is sometimes available in fixing its location. In Williamson v. Gooch[53] the court held it permissible to show that one time a measurement was taken from a monument (a fence) no longer existing to a certain stake, and also in order to show where that certain point (the fence) was, a measurement could be taken from the stake. In fact the stake had actually been replaced by a tree, but its location was unquestioned. Likewise evidence establishing the fact that a fence was located four feet from the house was sufficient to establish its location at the time of the transaction.[54] These decisions suggest the great value of referencing stakes and other artificial monuments, and placing the referenced dimensions on the plat so as to indicate that they were actually made for the purpose of locating the monument with respect to more lasting structures. Furthermore, course and distance should not be disregarded in determining the identity of a monument, and in general if the call for the monument is made in the deed, the location and identity may be proved by testimony not found in the grant but consistent with it.[55]

[§ 133.] (C) Stakes as Lines Marked and Surveyed. —Stakes are generally classed as artificial monuments, but under certain circumstances they may be regarded as lines marked on the ground at the time of the survey, and as such constitute the best evidence of the intention of the parties, and are controlling above all other calls.[56] No general fixed rule can be stated to determine the regard to be given a stake in such a situation, for the decision depends upon the character of the monument, the surrounding circumstances, and the actions of the parties at the time of the transaction. The simultaneous consideration of these facts

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[53]103 Maine 402, 69 Atl. 691.

[54]Samples v. Kergan, 109 Wash. 503, 187 Pac. 383.

[55]See §§ 68, 69, 70, supra.

[56]See section 77.

would lead to ridiculous hair splitting, and is rendered unnecessary by the underlying fundamental principle that it is the intention of the parties effectually expressed and not merely surmised that controls. All calls are but guides pointing to this intention, and those, which in a given case are more positive, prevail regardless of an arbitrary arrangement of precedence.

[§ 134.] **(D) The General Rule.**—When it is considered that an object to be regarded as an artificial monument must possess visibility, permanence and stability, and that in general these properties are not as strong as are found usually in a natural object, it is apparent that after natural monuments, artificial objects control all classes of calls.[57] It is essential that they be mentioned in the deed,[58] and to control must be fixed, stationary, and well defined.[59] Furthermore they should be sufficiently known and certain to indicate the supposed intent,[60] and must exist at the time of the deed or be erected to conform to the intention shortly after its execution.[61]

[§ 135.] **(E) Over Plats.—(1) The Rule.**—In Mississippi it has been held that a call for a lot as laid down on a plat will prevail over courses and distances and ordinarily over other monuments,[62] but it is more generally held that the lines and figures on a plat described in a deed become part of the description by reference as if the courses and distances shown thereby were specifically set out, and such lines and figures on the plat are not natural or artificial monu-

[57]Ulman v. Clark, 100 Fed. 180 citing Fulwood v. Graham, 1 Rich. L. (S. Car.) 491; Thatcher v. Matthews, 101 Tex. 122, 105 S. W. 317.

[58]Talbot v. Smith, 56 Ore. 117, 107 Pac. 480, 108 Pac. 125.

[59]Smith v. Hutchison, 104 Tenn. 394, 58 S. W. 226.

[60]Church v. Steele, 42 Conn. 69.

[61]Blaney v. Rice, 20 Pick. (37 Mass.) 62, 32 Am. Dec. 204. See also Davis v. Rainsford, 17 Mass. 207 (§ 151 infra); Makepeace v. Bancroft, 12 Mass. 469 (§ 151 infra).

[62]O'Herrin v. Brooks, 67 Miss. 266, 6 So. 844.

ments;[63] therefore artificial monuments usually prevail over plats, maps or field notes.[64] The basis of this rule is that the lines of a survey are the lines as actually run, and the aim is to prevent controversy regarding the location of lot corners by subsequent surveys by plat dimensions. Therefore, if stakes are planted by authority and the lots purchased and taken possession of in reliance upon them, the purchasers have the right to maintain the line established by them as a boundary even though a subsequent survey shows it to be wrong.[65]

[§ 136.] (2) Application.—(a) Effect of Evident Error.—In the case of Bauer v. Gottmanhausen[66] an error had been made in the frontage of Lot 28 on Clark Street, Chicago, so that the lines of all lots on the north were, as staked, ten feet to the north of the plat location. It was soon discovered, but at the time the property was not considered sufficiently valuable to warrant the cost of correction, and property owners took possession according to lines staked on the ground. Years later the confusion resulted in litigation, and the courts held that staked lines long recognized and acquiesced in prevailed over the course and distances of the plat. "The marks of a block consist of the marks, if any such are found, of every tract in the block."[67] Thus in Weidlich v. Independent Asphalt Paving Co.[68] a conveyance described certain land by lot and block number referring for location to a certain plat. A survey by courses and distances from a government corner as shown by the plat, conflicted with old stakes which, according to the testimony of two surveyors, were recognized points of the

[63]Smith v. Harbaugh, 216 Ala. 202, 112 So. 914.

[64]Brause v. Fayette County, 164 Iowa 606, 146 N. W. 6.

[65]Le Compte v. Lueders, 90 Mich. 495, 51 N. W. 542, 30 Am. St. 450, citing Flynn v. Glenny, 51 Mich. 580, 17 N. W. 65.

[66]65 Ill. 499, cited in Read v. Bartlett, 255 Ill. 76, 99 N. E. 345.

[67]Goldsmith v. Fillman, 33 Pa. Super. Ct. 44.

[68]94 Wash. 395, 162 Pac. 541.

original survey. Furthermore it was established that the error was in tying the plat to the government corner. Under these circumstances the marks of the lots within the subdivision prevailed as monuments over the courses and distances from the government corner laid down in the plat.[69]

[§ 137.] (b) **Effect of Practical Location.**—It is poor practice to scale distances or measure angles from plats. Monuments on the ground will always prevail over surveys based on data thus obtained. In Bartlett v. La Rochelle[70] the plat of a subdivision showed Forest Street as straight from Auburn to High, whereas the city engineer in giving the street a practical location had deflected it at Valley Street so that his south line was twelve (12) feet from the plat line. His location agreed with monuments found in place and mentioned in the conveyance from Rand to Elliot as locating one of the lines in question. It was contended

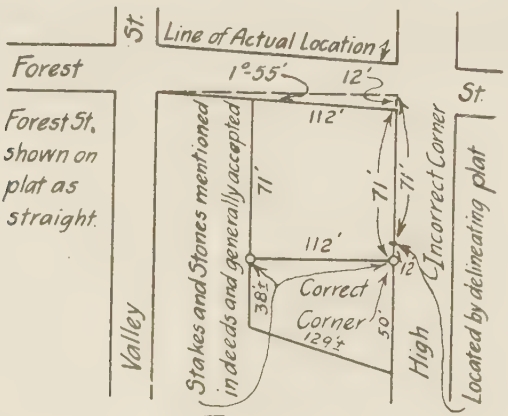

Fig. 19.

that the correct location of the monumented line was not as fixed by the stakes and stones but twelve (12) feet to the

[69]See Wolpert v. Chicago, 280 Ill. 187, 117 N. E. 447 (§§ 253, 283, infra).

[70]68 N. H. 211, 44 Atl. 302.

north as determined by the plat distance taking Forest Street as straight. The court held that the stakes mentioned in the deed as two corners of the lot fixed its location and controlled the plat which differed.

[§ 138.] **(c) Effect of Attendant Circumstances.**—The attendant circumstances of a transaction may determine the control of conflicting elements. Thus in Dows Real Estate and Trust Co. v. Emerson[71] a conveyance referred to the Wynn plat which showed First Avenue upon which the property faced as one hundred and twenty (120) feet wide. Prior to the incorporation of the subdivision into Cedar Rapids, Iowa, the avenue had been a country road sixty-six (66) feet in width. On the first city plan it was made one hundred and twenty (120) feet wide and known as Iowa Avenue. An attempt had been made to vacate a portion of the plat, and it was contended by the defendant that Iowa Street which had become known as First Street was sixty-six (66) feet wide. These facts strongly suggest that the plat should control as being the only element in the problem which is definite, and a lower court had so decided. However Emerson's predecessor in title had, when purchasing the lot, recognized and taken possession to a fence along the line of the sixty-six (66) foot street and had fully understood its location, for she had acquired fifty (50) feet extra in depth to provide against future rewidening of the street. No claim was made beyond the lines of the property as established from the fence until ten years later, when Wynn made a survey for Emerson using his plat as called for in the deed, and the latter sought to claim twenty-seven (27) feet to the rear. The facts as outlined were fully established by the evidence, and the Supreme Court held that the fence as a monument represented the understanding of the parties at the time of the transaction,

[71] 125 Iowa 86, 99 N. W. 724.

and for this reason controlled over the Wynn plat distinctly called for in the deed, but which as a basis of laying down the grant made one of the admitted elements of the transaction unnecessary.

[§ 139.] (F) Over Adjoiners.—(1) The Rule.—Where a deed describing land gives as boundaries some of the adjacent lands and refers to a plat attached to the deed for a fuller description of the land conveyed therein, as a rule the land conveyed is the land marked and delineated by the surveyor who ran the lines when the deed was made, and such deed only covers the land so run, marked and described;[72] for to establish the location of a block, its own marks and monuments upon the ground must be taken as indicating its boundaries, and only if these be absent will the adjoiners corresponding to its calls fix the location.[73]

[§ 140.] (2) Application.—Thus in Marsh v. Marshall [74] the defendant's deed described the boundary in question "a stake and stones by the bridge, thence running the

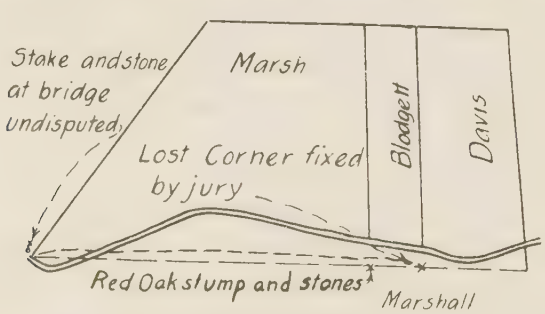

Fig. 20.

southerly side of the cart path, to a stake and stones at the corner of Davis' meadow." The plaintiff's deed read in part

[72]Connor v. Johnson, 59 S. Car. 115, 37 S. E. 240.

[73]Lehigh Valley Coal Co. v. Beaver Lbr. Co., 203 Pa. 544, 53 Atl. 379.

[74]19 N. H. 301, 49 Am. Dec. 156.

"south-easterly by Blodgett's land, to Marshall's land, to an oak tree with stones about it, thence by Marshall's land, south-westerly, to the bound at the bridge." The defendant offered to show that Blodgett's land extended only to the cart path, and not to the "oak tree with stones about it," but the court held this irrelevant for the extent of Marsh's land was fixed by the call for the monument; namely, the undisputed oak tree, and not by the call for Blodgett's line as an adjoiner. It is also interesting to note that the Marshall line was construed to be a straight line[75] from the oak tree to the stake at the bridge entirely south of the cart path. The court noted that the call was not for a line "by, upon, on, or along" the cart path and was satisfied by any line to the south of the path, and not necessarily along its southern side.

[§ 141.] (3) **Exceptions.**—It is, of course, essential that the call for the monument be made in the deed. In Breneiser v. Davis a lot was conveyed as Number 140 South 8th Street being nineteen (19) feet five (5) inches by one hundred and twenty (120) feet, situated on the west side of 8th Street bounded on the north by other property of said Andrew Davis, on the west by other property of the same, on the south by property of Mary R. Marhett and on the east by Eighth Street. The sale was at auction where an unrecorded plat showing a fence as the north line was on exhibit, but no reference was made in the deed to this plat, and the purchaser testified that its existence was not called to his attention. Under these circumstances the fence, not mentioned in the conveyance yielded to line established nineteen (19) feet five (5) inches from the adjoiner Marhett.[76]

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[75]See also Wynne v. Alexander, 7 Ired. L. (29 N. Car.) 237, 47 Am. Dec. 326.

[76]Breneiser v. Davis, 134 Pa. 1, 19 Atl. 433.

[§ 142.] (G) Over Courses and Distances.—(1) The Rule.—There is no principle of land law more firmly settled in this and probably most of the states in respect to country lands than that where the calls of a deed or other instruments are for natural or well defined artificial monuments, both course and distance when inconsistent with such calls must give way and be disregarded. This rule is founded on the soundest reason and good sense and is equally so in its application to town lots.[77]

[§ 143.] (2) Reasons for and Strength of Rule.—The rule in regard to artificial monuments as a guide to determine the intention is established on the same principle as that for natural monuments,[78] and the essentials for its operation and the exceptions thereto are similar. The force of the rule is dependent upon the physical characteristics of the monument, and no definite criterion can be given to ascertain its strength. Thus a street in a large city may be to all intents and purposes a natural monument possessing definition, permanence and visibility. In such cases it would control with great strength but "in the infancy of a town or city streets are not defined, and are but portions of land dedicated to public use, as described on some chart or plan of town or city, requiring themselves to be located or fixed," and therefore they furnish very uncertain guides in arriving at the boundary of other lands.[79]

[§ 144.] (3) Application.—(a) Effect of Survey from Original Stakes.—In Werkheiser v. Foard,[80] where a tract had been surveyed, and the corners of blocks, lots, streets

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[77]McPherson v. Foster, 16 Fed. Cas. 8921, 4 Wash. C. C. 45; Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668; Silver King Coalition Mines Co. v. Conklin Min. Co., 255 U. S. 151, 65 L. ed. 561, 41 Sup. Ct. 310; Temple Lbr. Co. v. Felts (Tex. Civ. App.), 260 S. W. 228.

[78]See §§ 93, 95, supra.

[79]Doe v. Riley, 28 Ala. 164, 65 Am. Dec. 334; Church v. Steele, 42 Conn. 69. See § 248, infra.

[80](Tex. Civ. App.), 108 S. W. 983.

and alleys marked by stakes, the surveyor died, and another was employed to prepare a plat from the one made at the time of the survey and to put it in condition for record. On the margin was a note to the effect: "All alleys 20 feet wide, streets 80 feet wide. Avenue N 60 feet wide, whole lot 110x150 feet except on west side of blocks 1 and 4." Lot Four of block Two was conveyed to Foard by Chapman (1882, 1883) who laid out the addition by two deeds describing the portions conveyed as "south one half of lot 4 in block No. 2, fronting 75 feet on 9th St." and "North one half of lot 4 in block 2, fronting 75 feet on 9th Street." Lot Three, Block Two had by prior conveyance been deeded to Rich. At the time of the Foard conveyance Campbell pointed out stakes set by the original surveyor at the southeast and northeast corners of Lot Four. These were exactly one hundred fifty (150) feet apart. Foard built a fence and planted a hedge as indicated in the sketch. Later (1896) he conveyed the south half to Charles R. Renker in

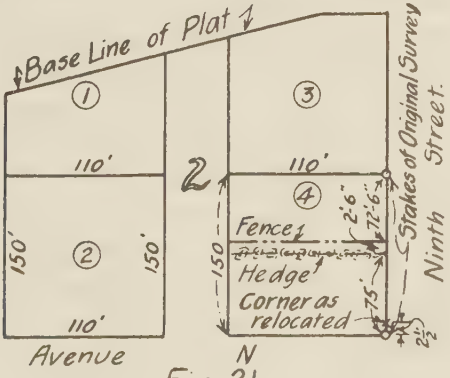

Fig. 21.

a deed describing it as above. In 1901 this portion of the lot was purchased by Blum who sold to Levy in 1904, who in turn conveyed to Werkheiser a few months later. Dur-

ing the occupancy of Renker and Blum, Foard had claimed to the hedge, and they acquiesced in it. Werkheiser however claimed to the fence and based his claim upon a survey starting from the monuments on the base line of the plat and establishing the corner of Avenue N and 9th Street by course and distance two and one-half (2½) feet north of the pine stake pointed out by Campbell as a stake of the original survey. No evidence was introduced to establish that the resurvey followed the procedure of the original, and it was well known that the surveyor who laid down the subdivision was careless. The court held that the original corner, witnessed by the pine stake pointed out by Campbell controlled over that established by course and distance, and that the south half of Lot Four extended from this stake seventy-five (75) feet along 9th Street to the hedge.

[§ 145.] (b) Effect of Corroborative Evidence.—In Campbell v. Seattle[81] the strength of the controlling monument was established by testimony of surveyors, and its agreement with plat dimensions. On the plat (dated 1888) of a certain addition it was stated that the initial point of the survey was 1,347 feet south and 1,350 feet west of a certain government corner. This point was the northeast corner of Campbell's lot and as located by course and distance (survey of 1910) made the same fifty-three and nine-tenths (53.9) feet wide against a width of forty (40) feet as given on the plat. Third Street, adjoining, was correspondingly narrower. Competent surveyors testified that in 1893 and 1895 they had found the initial stake and others which established Campbell's lot as forty (40) feet wide and that the lots had been enclosed in conformity with these original stakes. The court held that the bounds of the lot were established by the stakes and not by course and distance as run from the government corner.

[81]59 Wash. 612, 110 Pac. 546.

[§ 146.] **(c) Application to Party Walls.—(aa) General.**—Party walls although built by men are sufficiently substantial to be regarded as monuments of great dignity, and as such should control calls for course and distance. They occur primarily in cities where frontage is valuable, and this consideration gives great weight to the distance along the street line. A review of the decisions pertaining to such cases emphasizes the necessity of making the call for the party wall definite and in such a manner that it clearly fixes the terminals of the line along the street.

[§ 147.] **(bb) Call Must Be Locative.**—In Meadows v. Michel[82] the deed described the property as commencing at a point two hundred and thirty-three (233) feet from the intersection of a street and a certain railroad property. The side lines were described as "running through party walls." The court held that the course and distances controlled and were unaffected by the incidental reference to the party walls which did not attempt to locate the line in their center but would have been satisfied by lines anywhere within the walls.

[§ 148.] **(cc) Call Must Fix Terminal.**—The case of Smyth v. McCool[83] cited in the above and in several other New York cases is even more significant. The deed in question read: "Beginning at a point on the east line of Madison Avenue distant sixty-three feet northerly from the northerly line of 61st Street, thence running northerly along easterly line of Madison Avenue sixteen feet, thence easterly and parallel with 61st Street, and part of the distance through the center of a party wall, erected partly on the land herein conveyed and partly on the land adjacent thereto on the north eighty-five feet." The call for the south line of the lot was similarly described as through the center

[82]135 App. Div. 213, 120 N. Y. S. 319.

[83]22 Hun (N. Y.) 595.

of a party wall. In reality the center lines of the walls involved were sixty-two feet seven inches and seventy-eight feet seven inches north of Sixty-first Street. The plaintiff invoked the doctrine that visible location and fixed monuments control all other calls, but the court observed that the five inch discrepancy was not visibly revealed by the monuments. The court also said, "As to the party wall, the plaintiff is mistaken in saying that the premises are bound on the north and south thereby. After specifying sixty-three feet—it continues 'thence running northerly along the east line of Madison Avenue sixteen feet'—not sixteen feet to the center of a party wall." In other words the calls for the "center of a party wall" in the second and fourth courses in no wise controlled the distance calls of the first and third lines. In fact the court further said, "It is to say the least extremely doubtful whether an incidental expression can control a clear and unambiguous description furnished by a few short simple and distinct courses and distances."

In Ehrenreich v. Froment[84] the deed description was essentially the same as above, and Justices Patterson, McLoughlin and Hatch concurring applied the theory set forth in Smyth v. McCool and gave control to course and distance. Justice Laughlin in dissenting regarded the party wall in question as a monument and preferred to give it precedence over course and distance.

The case of Muhlker v. Ruppert[85] stands out in distinct contrast to the preceding in that the call for the point of beginning is distinctly tied to the center line of the party wall. The deed read: "Beginning at a point on the southerly side of One Hundred and twenty-fourth Street distant two hundred and ninety-eight feet from corner formed by ——— *at* or *in front of* a party wall etc." The wall was

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[84]73 App. Div. 213, 76 N. Y. S. 861.

[85]124 N. Y. 627, 26 N. E. 313.

actually two hundred and ninety-three (293) feet from Madison Avenue, but as a monument prevailed over the deed distance, for it was certain and could in no wise be regarded as incidental.

These cases establish that in New York if the party walls are to control the frontage of a property, it is essential that terminals of the course along the street line be distinctly called for as "at or in front of the center line of a party wall," or that there is incorporated in the deed a distinct statement to the effect that the center lines of the party walls are to control the calls for distance. In the city frontage is too valuable to tolerate the strict application of the rule giving monuments absolute control over short and significant distances.

[§ 149.] (dd) Rule Not General.—In Pennsylvania the courts regard party walls as permanent monuments,[86] and give them control even when the reference to them in the deed is indirect and remote. Thus in Medara v. Du Bois[87] two houses were erected with a common wall and in disposing of them a common grantor deeded them by courses and distances so that the title of the narrow strip down the center of the party wall was in doubt. The calls for the beginning point and frontage on the street were definite and unqualified. The calls for the side lines described them as parallel lines at right angles to the street and made no mention of the party wall. In the agreement the property was referred to as "3816 Locust Street," and the court regarded this as sufficient to warrant the recognition of the common wall as a party wall. With the party wall thus indirectly established as a monument, it was held that the grant conveying the east house carried the property to the center line of the party wall despite the fact that the unqualified distances established the limiting line several inches away.

[86]Warfel v. Knott, 128 Pa. 528, 18 Atl. 390.

[87]187 Pa. 431, 41 Atl. 322.

[§ 150.] (ee) **Only Locative Distances Control.**—Where the distance calls are dimensional but not locative, a party wall mentioned in a deed or shown in a plat referred to will prevail. Thus in Schwalm v. Beardsley[88] a property was conveyed as "All that certain lot or parcel of land with a brick tenement thereon lying on the east side of 17th St. between Walnut Alley and Franklin St. now occupied by J. Wondelehr, fronting on 17th St. 18′-10″ and running back between parallel lines 68′-2″ to a common alley, the lot conveyed being lot No. 4 as laid off and designated on a plat of a survey made by J. Pleasants, and hereto attached as a part of this deed." The plat showed the party wall as a boundary, and the grantor owned the tenements on both sides. The reference in the deed clearly incorporated the plat in the description, and the conflicting distance and other elements in the description did not locate the grant. Therefore, reference to the plat must necessarily be made to lay the grant accurately on the ground, and the call for the party wall alone gave the lot its location.

[§ 151.] (3) **Considerations Essential to Render Rule Operative.**—For the rule to be effective the existence of the monument must be established and its identity proved,[89] and an office call for a monument not placed by the surveyor can not prevail.[90] Furthermore, it is essential that the monument be referred to in the deed.[91] In some jurisdictions a monument properly referred to in a conveyance but not erected until shortly after the deed will control.[92] The time element and the intention to place such a monument in conformity with the calls of the deed are very im-

[88]106 Va. 407, 56 S. E. 135.

[89]Hanson v. Red Rock, 4 S. Dak. 358, 57 N. W. 11.

[90]Holdsworth v. Gates, 50 Tex. Civ. App. 347, 110 S. W. 537.

[91]Temple v. Benson, 213 Mass. 128, 100 N. E. 63; Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179.

[92]Blaney v. Rice, 20 Pick. (39 Mass.) 62, 32 Am. Dec. 204, citing Cleaveland v. Flagg, 4 Cush. (58 Mass.) 76.

portant in determining the control of such a monument. In Davis v. Rainsford[93] the deed stated that a wall was to be erected on the line in dispute, and the fact that there was a wall soon after erected on the line as fixed by the deed distance aided in the exception to the general rule that a monument (an adjoiner) controls over distance. In effect this wall erected after the transaction in a position called for in the conveyance became a monument.

In Makepeace v. Bancroft[94] a center line of a wall fixed as a boundary in a deed prevailed over course and distance where it was clearly established that the wall was not placed as intended by the parties. In other words their intentions to regard the wall as a boundary and to each take to the center line thereof was given effect in spite of the fact that the wall was wrongly located. The details are complicated, but the essential points begin with the transfer of a lot by Ruggles to M'Neil described by metes and bounds to which was added "I do also convey to said M'Neil the one half of a brick wall that I engage to erect on the adjoining lot now owned by Mr. Sikes which said Sikes is this day to convey to me." There was a stake on the ground marking the line between the lots, and it was Ruggles' intention and M'Neil's understanding that the wall was to be half on each property. Through an error the wall was built so that it was entirely on Ruggles' lot, a fact not discovered for a number of years. A year later Ruggles conveyed the property to Brown, describing it by course and distance and calling for the M'Neil property as an adjoiner. Later in the same year M'Neil conveyed his property to Bancroft defining it by course and distance as in his deed from Ruggles which carried the grant only to the exterior line of the wall as erected and then included "one half of the brick wall as mentioned in said deed." The conveyance out of Ruggles included all the wall within its

[93]17 Mass. 207.

[94]12 Mass. 469.

courses and distances and called for M'Neil as an adjoiner. That out of M'Neil was conflicting for it called for one-half of a wall not included within the courses and distances. The question as to the title of the half of the wall arose, and the court held that it was in M'Neil at the time of the sale to Bancroft on the grounds that the conveyance from Ruggles to M'Neil definitely specified the center line of the wall which was to be erected shortly as the boundary, and that the wall when erected was a monument and prevailed. "If a conveyance of land refers for its boundary to a monument not actually existing at the time and the parties afterward fairly erect such a monument, intending to conform to the deed, the monument so placed will govern the extent of the land, although not entirely coinciding with the line described in the deed."

The ackowledgment that the monument as established does not comply strictly with the line of the deed may suggest that its control overcomes the intention of the parties. In this connection the time element plays an important part, and if the monument is established shortly after the transaction and to the agreed satisfaction of the parties, the procedure is the equivalent of putting the grantee in possession to an actual located line, evidenced by an enduring monument which constitutes physical evidence of the intention, and as such should prevail over course and distance which may be subject to error. There is the same likelihood of error in measuring the distance to a monument as there is in laying out the lines for its erection, and therefore its control is unaffected by its existence or nonexistence. While it is true that an existing monument possesses visibility and is therefore of significance to the parties when viewing the premises, whereas a monument to be erected is of no such assistance, this is overcome by the fact that the latter will shortly be given existence and visibility by the mutual efforts of the parties, and, if not

satisfactory to either, the difference can be adjusted before correction involves expensive structures. The rule as applied is thus not only in compliance with the intention of the parties as actually expressed on the ground but also affords stability to property lines.

If the monument mentioned is not erected within a reasonable time after the execution of the instrument, it loses its strength and will not control. In White v. Bliss[95] a deed from White to Hunt gave the grantee the right to flood certain land to a height of a hole to be drilled in a certain rock described in the deed. The hole was not drilled until nineteen years afterward when, without White's knowledge, it was placed in the proper rock by Hunt who had in the meanwhile disposed of his interests to Bliss. There had been considerable disagreement concerning the rights of the various parties, and the drilling was not done by a mutual act. The court held that evidence proved that the hole was correctly placed but did not establish it as a monument. The long lapse of years and the controversy clouded the entire issue so that it could not be maintained that the hole, right or wrong in its location, represented the intention of the parties at the time of the transaction.

[§ 152.] (4) Exceptions.—Where the control of an artificial monument over a course and distance would defeat the evident intention of the deed, an exception must be made,[96] and likewise where their adoption is so manifestly wrong as to lead to an absurd result, such as embracing land of a third party, the monuments yield to course and distance, and even quantity.[97] Calls for natural or artificial

[95]8 Cush. (62 Mass.) 510.

[96]Ehrenreich v. Froment, 73 App. Div. 213, 76 N. Y. S. 861; Lawson v. Murden, 60 Misc. 163, 112 N. Y. S. 140; White v. Luning, 3 Otto (93 U. S.) 514, 23 L. ed. 938.

[97]Post v. Wilkes-Barre Connecting R. Co., 286 Pa. 273, 133 Atl. 377.

monuments made by mistake or upon conjecture[98] or for hidden monuments to which no reference is made in the deeds or plats are subordinate to course and distance.[99]

[§ 153.] (H) Over Quantity.—Neither weight nor effect will be given a description in a deed in terms of quantity except for the purpose of relieving some otherwise irremediable ambiguity in the more particular description, and though a description by monuments, corners, and boundaries contains more than the amount specified by acres, the specific description will control.[1] Furthermore monuments erected by mutual consent control all statements in the deed including even such as "containing exactly one half acre."[2] However quantity may aid some other call such as course and distance to prevail over a monument as in Higginbotham v. Stoddard.[3]

V. CONTROL OF MAPS AND PLATS.

[§ 154.] (A) Function.—A plat is "a representation of land on paper, appealing to the eye by means of lines and memoranda, rather than by words,"[4] and in general the appeal thus made is clearer and more comprehensive than can be obtained by a careful inspection in the field. This is true even in regard to city lots where the dimensions are relatively short, for the map shows the relation of the property in question to the subdivision as a whole and to the street and property lines which may have no meaning on the ground because they are not marked or visibly fixed. A plat is in reality a record of the work performed in the field and a representation of the lines actually staked, and therefore a reference to a map is virtually a call for the

[98]Ramseaur v. Ball, 59 Tex. Civ. App. 285, 125 S. W. 590.

[99]Whitehead v. Atchison, 136 Mo. 485, 37 S. W. 928.

[1]Busbee v. Thomas, 175 Ala. 423, 57 So. 587.

[2]Emery v. Fowler, 38 Maine 99.

[3]9 Hun 1, affirmed 72 N. Y. 94 (§ 117, supra).

[4]Thompson v. Hill, 137 Ga. 308, 73 S. E. 640. See also § 80, supra.

monuments represented thereon; that is the stakes, corner stones and monuments shown as fixing the terminals of the lines actually run in the field.[5]

It should be borne in mind that a map is merely a record of work performed, and hence a transcript liable to error. This is especially true in regard to the courses and distances[6] shown thereon, and it is very evident that these when found on a map can have no greater weight than when found in the deed. They are merely guides pointing to the location of monuments set forth on the plat, and only when they confirm such location do they give the plat added prestige. In general, maps and plats are accorded relatively great prestige because of the numerous natural and artificial objects they usually call for. In this connection courts often disregard the dimensions of a plat so that it may be interpreted as a whole and in accord with the intention of the maker. Thus a map showing twelve lots each having a dimension frontage of fifty feet in a block which is actually a trifle more or less than six hundred feet in frontage would be interpreted to mean that the owner intended to lay down twelve lots of equal frontage.[7]

[§ 155.] **(B) The General Rule.**—Where a map or plan of a tract of land with lines drawn upon it marking its boundaries and with the natural objects upon its surface laid down, is referred to in a deed as containing a description of the premises therein conveyed, this map or plan is to be regarded as a true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself,[8] and "where there is a description by courses and distances and one by reference to known monuments, the latter prevails; and a map or plan referred to

[5]Jackson v. Freer, 17 Johns, (N. Y.) 29, 31. See Vance v. Fore, 24 Cal. 435, infra.

[6]See § 155, infra.

[7]Booth v. Clark, 59 Wash. 229, 109 Pac. 805.

[8]Vance v. Fore, 24 Cal. 435.

(certainly if it be as in this case a public record) stands upon the same footing *as a monument* and is of even higher authority,"[9] but the courses and distances as indicated on the plat do not enjoy this prestige.[10] Furthermore, where parties take possession by deeds according to measurements stated in a public plat of a city addition, their rights are governed by the rule that the lines of the plat as actually located on the ground control over monuments and other surveys.[11]

[§ 156.] **(C) Application.—(1) Plat more certain.**—In the case of Wilson v. Chicago Lumber & Timber Co.[12] a plat was construed to prevail over a conflicting distance, but it serves to illustrate that a map under particular conditions may be the only means of attaining certainty. In fact, the plat in question was drafted for this very purpose. The South Platte River had flooded its banks until they were no longer well defined and easily ascertained. An engineer, Ebert, had prepared a map which was drafted carefully to scale to show the position of the channel, and property owners had accepted it as correct and deeded with reference to it. On this plat the river bed at its nearest point was two hundred and sixty (260) feet from F Street. The deed of the lot in controversy called for a course as running "westerly to the east line of old bed of the South Platte River, as the same is marked and defined on the map of said city as per survey of F. J. Ebert; thence southerly along east line of old bed 62 feet; thence in a direct line southerly and parallel with F Street to a

[9]Wilson v. Chicago Lbr. & Timber Co., 143 Fed. 705, 711, citing Coles v. Yorks, 36 Minn. 388, 31 N. W. 353; Parks v. Loomis, 6 Gray (72 Mass.) 467; Lunt v. Holland, 14 Mass. 149; Wolfe v. Scarborough, 2 Ohio St. 361; Magoun v. Lapham, 21 Pick. (38 Mass.) 135. See § 162, infra.

[10]See Smith v. Harbaugh, 216 Ala. 202, 112 So. 914 (§ 135, supra); Appeal of Richardson, see § 75, supra.

[11]Macom v. Brewster, 273 Mo. 616, 201 S. W. 547.

[12]143 Fed. 705, reversing 129 Fed. 636.

point 106 feet northerly from Williams Street and 125 feet from F Street, thence at right angles and in a direct line easterly 125 feet to the point of beginning." The bed of the South Platte as shown on the map made this last course three hundred and fifty (350) feet. In the first trial

Fig. 22.

the general rule giving maps control over courses and distances was recognized, but the court cited the principle that a plat of a town is always open to correction from field notes or competent evidence to show the true lines of a survey[18] and reasoned that the plat merely established the old bed of the South Platte as a monument, and that this failed to control the construction of the deed, because it lacked the essential property of fixed location. Therefore the deed distance of the third course together with the other calls fixed the extent of the grant.

In the second trial the court noticed that the deed called

[18]Wilson v. Chicago Lbr. &c. Co., 129 Fed. 636 (reversed 143 Fed. 705).

in particular for the east bed of the river "as marked and defined as per survey of F. J. Ebert," and that it was the paper location of the bed as shown on the map that the parties accepted as a controlling monument rather than the actual channel vague and indefinite on the ground. Furthermore, evidence established that this paper location was generally accepted as a boundary of adjacent properties and therefore it was held that the plat controlled the erroneous distance of the third course.

[§ 157.] **(2) Plat Must Be Referred To.**—The necessity of referring to a map or plan to interpret a deed is very important and adds considerably to the weight to be given to the map. If the conflicting description, whatever its nature, is so vague that reference must be had to the plat to give it significance, then the presumption is that the parties must have utilized the plat in coming to a common understanding.[14] Thus in Colyer v. Mann[15] a plat as a monument prevailed over the calls for distance in a deed and its own dimensions because the calls of the conveyance placed the lot at any of the four corners of a street intersection and reference to the map was necessary to locate the property definitely.

[§ 158.] **(3) Effect of Conflict With Notes.**—Where there is a conflict between a plat and the field notes, it is generally held that the plat controls, for the reason that it is not customary for a man buying a property to refer to the field notes,[16] but there is some authority to the contrary on the ground that the plat is a graphical representation of the field notes subject to error in its construction and therefore not as certain and reliable as the field notes on which it is based.[17]

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[14]See Arambula v. Sullivan, 79 Tex. 615, 16 S. W. 436 (§ 166, infra).

[15]18 Minn. 79.

[16]Haley v. Martin, 85 Miss. 698, 38 So. 99.

[17]Lillis v. Urrutia, 9 Cal. App. 557, 99 Pac. 992; Harrington v.

[§ 159.] **(D) Over Adjoiners—(1) The Rule.**—The call for an adjoiner will ordinarily yield to a map referred to in a deed, as a superior monument.[18] In this connection it should be recalled that the courts regard lines of adjoiners as artificial or natural monuments,[19] and therefore calls of strong control, which would prevail over courses and distances of a plat and yield only to other adjoiners established by the lines of the map. For the rule to operate, the call must be for the adjoiner as *merely adjacent* and not as a monument along which the boundary is to follow. This differentiation appears in the contrast of Wheatley v. San Pedro, L. A. & R. Co.,[20] and Shenley v. Pittsburgh[21] where, in both cases, the adjoiners were natural monuments, but the calls were radically different in their expression.

[§ 160.] **(2) Applications.**—In 1784 John Penn Jr. and John Penn made an agreement with Isaac Craig and Stephen Bayard regarding the sale of land at the junction of the Allegheny and Monongahela rivers, describing it by metes and bounds, and calling for the rivers as boundaries. In December of the same year the Penns conveyed to Craig and Bayard the land contracted for in the agreement, but described it as comprising thirty-two lots designated by number and referred to the Woods plat which had been made in the meantime. Following this was a general description of the blocks formed by the lots in which the streets and rivers as shown in the plat were called for as adjoiners. No mention was made anywhere in the description of Water Street along the Monongahela or of the open way (now Duquesne Way) along the Allegheny, both of which appear on the map, the adjoiners on these sides being

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Boehmer, 134 Cal. 196, 66 Pac. 214, 489.

[18]Robinson v. Myers, 67 Pa. 9.

[19]See Wilson Lbr. & Mill. Co. v. Hutton, 152 N. Car. 537, 68 S. E. 2; § 101, supra.

[20]169 Cal. 505, 147 Pac. 135. See § 107, supra.

[21]105 Pa. 472, infra.

given as the rivers. The property was ultimately acquired by the Shenleys who claimed to the rivers and brought suit

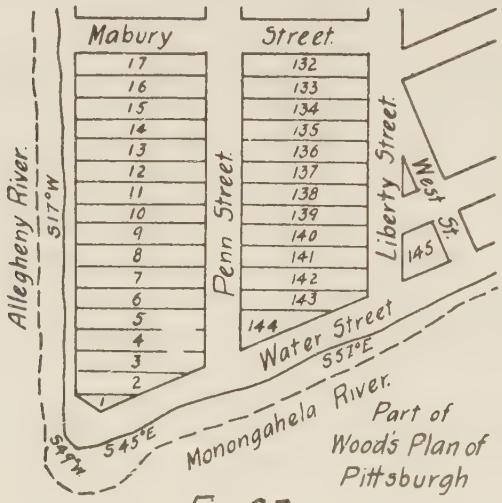

Fig. 23.

to eject the city from certain land between the bordering streets and the water's edge. The court held that the plat was incorporated in the deed to Craig and Bayard and that the particular description by lot number limited the conveyance to the actual lots as delineated on the ground, and that the general description of the blocks as a whole calling for the rivers as adjoiners could not extend the grant thereto.[22]

In the case of Barclay v. Howell[23] involving Lot 183 of the same plat, Water Street, the adjoiner as established by the map, controlled over the Monongahela as called for in the written description.

The case of Birmingham v. Anderson is an exact parallel. The town plan showed a beach along the river, and the

[22]See § 238, infra.

[23]6 Pet. (31 U. S.) 498, 8 L. ed. 477.

deeds called for the lots as "bounded by the river." It was held that the beach was the proper boundary and that it had been dedicated to the public.[24] In Robinson v. Myers[25] the deed called for an alley along the rear of the lot, but the plat referred to showed none and prevailed over the call in the deed.

[§ 161.] (E) Over Courses and Distances.—(1) The Rule.—A map as a monument controls calls for course and distance, either in a deed,[26] or on the map itself,[27] and a description of a block of land by metes and bounds or courses and distances is subordinate to the description of the same by its number according to an official plat and must yield in case of conflict unless the intention of the parties as clearly expressed in the deed itself supports the calls for metes and bounds.[28] The basis of this rule is the superior clearness of a pictorial representation over a verbal description and the ease with which errors may arise in transcribing the courses and distances upon the plat or in incorporating them in a description.

[§ 162.] (2) Application.—(a) Plat Controls Calls of Deed.—In Hayden v. Hayden[29] the conveyance called for the eastern half of Lot 2, Block 166, according to the plan of the city of Wilmington, and described the same as beginning at a point in the east line of Third Street sixty-six (66) feet southerly, etc., thence westerly one hundred and sixty-five (165) feet, etc., thus placing the entire width of the street in the lot. The city plan showed that the lot on the west side of Third Street overcame this absurdity

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[24]Birmingham v. Anderson, 48 Pa. Super. Ct. 253.

[25]67 Pa. 9.

[26]Green v. Palmer, 68 Cal. App. 393, 229 Pac. 876; Carter v. Elk Coal Co., 173 Ky. 378, 191 S. W. 294.

[27]See Oregon Home Builders v. Eisman, 88 Ore. 611, 172 Pac. 114 (§ 164, infra).

[28]Cook v. Hensler, 57 Wash. 392, 107 Pac. 178; Melcher v. Dehn, 117 Misc. 591, 191 N. Y. S. 650. See § 225, infra.

[29]178 N. Car. 259, 100 S. E. 515.

and obviously expressed the intention of the parties and therefore prevailed over the erroneous call.

The same point is illustrated in Coles v. Yorks[30] where the description read: "Commencing at the northeast corner of N. E. ¼ of N. W. ¼ of Sect. 33, etc., etc., being the south 25 feet of lots 1, 2, 3, and N 25 feet of lots 10, 11, 12 . . . of said block 3 . . . on which dwelling-house is situated." The description by metes and bounds starting from the corner described placed the property in block 1 where there was no house on the lots referred to (1, 2, 3, 10, 11, 12) while a house owned by the party concerned was situated on the premises as located by the map reference. It is therefore certain that the latter expressed the intention and hence should control.

In Cannon v. Emmans[31] where the conflict of calls was latent it was held that the map prevailed over a call for a certain starting point not marked and of necessity determined by a survey. Hutchins acquired a tract of land described as "beginning at a point 30 feet north of the southwest corner of N. W. ¼ of N. W. ¼ of Section 27 ————being the center of block 33 in Wilson, Bell and Wagner's addition, thence east —— —— thence north 418 feet to point of beginning." He deeded to Laraway a parcel in the northwest corner described as follows: "Beginning at the southwest corner of Lot 4 Block 33, plan of Wilson, Bell and Wagner's addition, thence east ——— thence north one hundred and fifty (150) feet (along Lyndale Avenue) to point of beginning. It should be noted that the southwest corner of Lot Four is at the center of the block and is described in the deed to Hutchins as such and also as thirty (30) feet north of the southwest corner of the N. W. ¼ of the N. W. ¼ of Section 27, but actually only 16.64 feet north. Laraway, relying on the correctness of the thirty (30) foot call of Hutchins' deed, then deeded

[30]36 Minn. 388, 31 N. W. 353. [31]44 Minn. 294, 46 N. W. 356.

to Cannon a lot described as "beginning at a point on the east side of Lyndale Avenue 60 feet south of the southwest corner of the N. W. ¼ of N. W. ¼ of Section 27; thence east—thence north 60 feet (along Lyndale Avenue) to point of beginning." If the correct location of the southwest corner of N. W. ¼ of N. W. ¼ of Section Twenty-seven is ignored and reference thereto is regarded only to tie the grant to Cannon to the southwest corner of Lot Four, this left in Laraway ninety (90) feet along Lyndale Avenue which he deeded to Emmans. Cannon, however, claimed his north line to be sixty (60) feet south of the southwest corner of the N. W. ¼ of the N. W. ¼ of Section Twenty-seven, and this carried Emmans' ninety (90) feet 13.36 feet north of the center line of the block and into Lot Four which Laraway never owned, and left 13.36

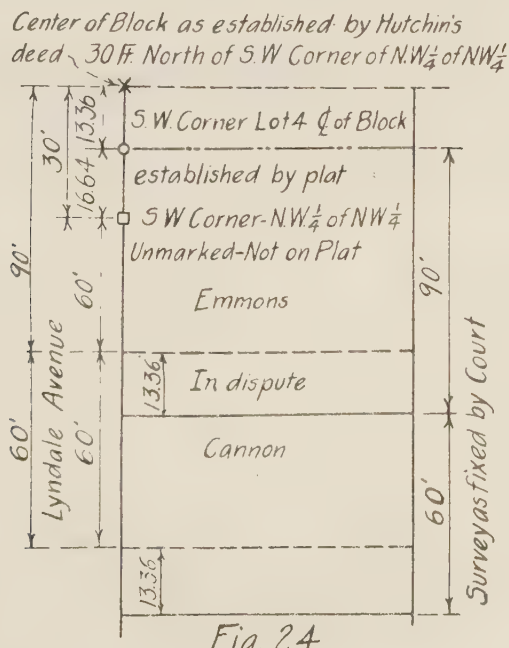

Fig. 24.

feet to the south of Cannon. All these circumstances indicate that the plat represented the intentions of the various parties, and therefore that it should control over the call for the unmarked corner, dependent upon a survey, and in conflict with the call for another corner shown on the plat and in harmony with all the various deeds. In the decision the court stressed the control of intention and emphasized the reasonableness of assuming under the circumstances that Laraway intended to deed the south sixty (60) feet to Cannon and the north ninety (90) feet to Emmans. The discrepancy in the tie between the two starting points was latent and not revealed until a survey was made and giving the plat control over the call for the conflicting starting point cleared the situation without violating the evident intention. The intention, clearly expressed and not merely surmised, as read in the light of circumstances and conditions, prevails.[32]

[§ 163.] **(b) Plat Establishes Superior Monuments.**— A plat may often establish an adjoiner not mentioned in a deed description, and this may take precedence over the courses and distances of the plat. Thus the lot shown in

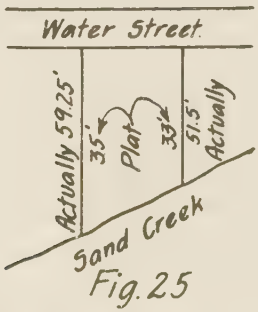

Fig. 25

the accompanying plat was ruled to extend from Water Street to Sand Creek with side lines of fifty-one and one-

[32]Witt v. St. Paul &c. Co., 38 Minn. 122, 35 N. W. 862.

half (51½) and fifty-nine and one-quarter (59¼) feet despite the plat dimensions of thirty-three (33) and thirty-five (35) feet. The plat established Sand Creek as an adjoining natural monument and as such it controlled the call for distance.[33]

[§ 164.] (c) **Effect of Established Adjoiner Being Unmarked.**—A more involved application of this principle is found in Oregon Home Builders v. Eisman[34] where an invisible adjoiner established by the plat prevailed over erroneous measurements of the survey. In staking out the rear of the lots the surveyor assumed the center line of

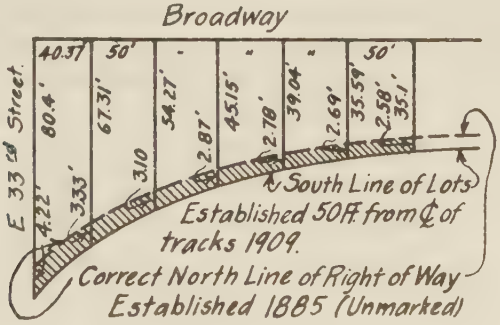

Fig. 26

the right of way to be the center of the tracks and took the property line as fifty (50) feet therefrom. A plat was prepared and lots sold using distances thus established. In reality the center line of the right of way did not coincide with the center of the tracks but differed so that the right of way extended beyond the rear of the lots as indicated. The court held that the plat made the rear of the lots coincident with the side line of the right of way, and thus recognized the right of way as a monument determining

[33]Nicolin v. Schneiderhan, 37 Minn. 63, 33 N. W. 33; Hutton v. Yolo Orchard Co. (Cal.), 258 Pac. 96. See Spinning v. Pugh, 65 Wash. 490, 118 Pac. 635 (§ 110, supra).

[34]88 Ore. 611, 172 Pac. 114.

the lot lines contiguous thereto and prevailing over the distances of the plat.

This decision is in perfect harmony with that of Morgan v. Godbee[35] where it was held that in case of conflict the true location of the right of way called for as an adjoiner prevailed over the location as understood to exist at the time of the deed, and that the purchaser could not recover damages for breach of warranty. Nevertheless, this case is not convincing, and it does not parallel that of Nicolin v. Schneiderhan[36] where the adjoiner was a visible water course, fixed in its location, and the only likelihood for error was in the measurement of the distance. The invisibility of the side line of the right of way is an essential element in the problem, for it renders the adjoiner absolutely uncertain in its location and therefore less definite than the dimensions, and the plat functioning only to establish the adjoiner in no wise overcomes this deficiency. Unless there is a clear statement in the grant recognizing that the unknown line regardless of location is to prevail, it is surely a fiction to assume that the parties understood an unknown line as a boundary when a certain line established by distances appeared on the plat before them.[37]

This point is well developed by contrasting this situation with that in Brainin v. New York, N. H. &c. R. Co.[38] where the lot involved was bounded on the south by Oak Street and on the north by the right of way. The deed described the lot by course and distance and referred to the plat which showed the dimensions given to the nearest hundredth of a foot, in perfect harmony with the calls of the deed. There also appeared on the plat a note reading in part as follows: "All lots adjacent to the N. Y., N. H. & H. R. R. are bounded by the correct south line of said rail-

[35]146 Ga. 352, 91 S. E. 117.

[36]37 Minn. 63, 33 N. W. 33 (§ 163, supra).

[37]See Unknown Line of Adjoiner, § 176a, infra.

[38]136 App. Div. 393, 120 N. Y. S. 1093.

road ———. The length or depths of said lots given on this map are from the north side of Oak Street to center of stone wall now standing on southerly side of ——— the tracks. The correct lengths or depths of all lots between the railroad and Oak Street may therefore be more or less than is laid down on this map, and this explanatory note is made a part of the description of each and every one of the aforesaid lots. H. C. March 31, 1879." This unquestionably is ample notice that the line of the adjoiner is to prevail over the distance call of the map, and the court so held. As the grantor in Oregon Home Builders v. Eisman failed to frankly acknowledge his ignorance of the exact location of the right of way, he should have been held responsible for his misrepresentations, especially as the lots were shallow and the depths which he stated with precision were very significant.

This viewpoint is upheld in Magoun v. Lapham[39] in which it is held: Where the line of a lot, mentioned in a deed of conveyance as a boundary of land conveyed, was not ascertained and known by the parties, and a plan of the land had been taken which is referred to in the deed as containing a more particular description of the land conveyed, and the description on the plan is clear and unambiguous, referring to monuments, courses and distances which can be ascertained with perfect certainty, and is consistent with the boundary line referred to (as an adjoiner) such a particular description will control the words of the general description, and the reference to such boundary line (the adjoiner) will be rejected. This reasoning merely rejects the least certain and gives effect to that which represents the understanding of the parties at the time of the conveyance. It applies with equal force in the rejection of the map when circumstances indicate that it is the least reliable. Thus in Post Hill Imp. Co. v. Bran-

[39]21 Pick. (38 Mass.) 135.

degee[40] a deed described land bounded on the north by land of Williams and for more particular description referred to deed to grantor, and also to a map and survey of Dabold and Son dated 1892. In the opinion there is nothing to indicate that the Williams line was visible and marked, and there is every reason to believe that the surveyor when running the courses and distances given in the map included the land to be conveyed and erred in believing that he was on the Williams line. Under these circumstances the map should prevail over the call for the adjoiner. The point that overcomes this reasoning is the fact that the map was not recorded and admittedly was not seen by the grantee nor used at the time of making the conveyance. Therefore the call for the adjoiner was of greater certainty than the courses and distances not given in the deed but on an unseen map referred to.

[§ 165.] (F) Over Quantity.—(1) The Rule.—Where land is conveyed by specifying lot numbers and referring to a map and the deed states the area qualified by the expression "more or less," the description by lot number and reference to the map controls,[41] and the rule is the same even when the quantity is specifically stated, for such a call is purely descriptive,[42] and all other elements of description must lose their superior value through ambiguities and uncertainties before resort can be had to quantity.[43]

[§ 166.] (2) Application.—Where the measurements of a lot are given merely as quantities and reference must be made to a map to locate the grant, the plat although uncalled for will control. Such a situation arose in Arambula v. Sullivan[44] where the grant conveyed "lot 1, block 2,

[40]74 Conn. 338, 50 Atl. 874.

[41]Mechler v. Dehn, 117 Misc. 591, 191 N. Y. S. 650.

[42]Mechler v. Dehn, 117 Misc. 591, 191 N. Y. S. 650, citing Overacker v. Cole, 16 Johns. (N. Y.) 257. See also Somers v. McMordie, 155 Cal. xvi, 99 Pac. 482; Wadhams v. Swan, 109 Ill. 46.

[43]South Penn Oil Co. v. Knox, 68 W. Va. 362, 69 S. E. 1020.

[44]80 Tex. 615, 16 S. W. 436.

town of Concho, Millpaugh's addition to San Angelo, said lot being 60 feet front by 120 feet deep." Later Lot Two, Block Two, was conveyed to the same grantee using the same form of description. The grantor owned the whole block and the plat which was not called for in the deed showed all the lots in the block to be twenty-six (26) feet front by one hundred and twenty (120) feet deep. The court held that the plat must have been in the minds of the parties for otherwise the lots could not be given a location, and that the description by lot and number limited the conveyance to the land delineated on the plat as constituting these two lots. It should be carefully noted that the extension of the rule to a plat not called for, could not have been made if the deed description had given more particulars such as point of beginning, bearings, points run to, and calls for monuments, so that it was complete and independent. It was the fact that the quantities (in this particular incident linear measurements) were not locative that gave the plat control.

VI. CONTROL OF ADJOINERS.

[§ 167.] (A) Over Course and Distance.—(1) The Rule.—"A well established line of an adjacent survey is a natural monument within the rule that course and distance give way to natural monuments, because the line is more certain than course and distance."[45] If an unmarked line is well known and generally recognized it is a monument within the meaning of the rule although it has never been actually run and located upon the ground.[46] It is primarily in the extension of the rule to unmarked lines that exceptions are found, for not having physical existence they lack visibility and definition, and therefore can not be regarded as the practical expression of the intention of the deed.

[45]Wilson Lbr. & Mill Co. v. Hutton, 152 N. Car. 537, 68 S. E. 2.

[46]Land Co. v. Saunders, 103 U. S. 316, 26 L. ed. 546.

For this reason it is most essential that the calls of the conveyance indicate that such lines unquestionably represent the common understanding of the parties at the time of the transaction.

[§ 168.] (2) **Reasons for Rule.—(a) Best Evidence of Intention.**—"A call for the line of another tract is a 'natural boundary' and controls course and distance on the ground that there can be no mistake in respect to the intention to go to the line of the other tract, whereas in respect to course and distance there may be a mistake in entering upon the field notes or in transferring the entry to the description set out in the grant."[47] This is logical for a call for the line of the adjoiner raises the strong presumption hard to overcome that the grantor used it as a factor of safety to relieve him of responsibility for reasonable errors and to protect the grantor against being bounded by an odd-shaped, useless parcel of land, which is of no value to the grantor, and a potential source of future annoyance to the grantee or those holding under him, should they desire to consolidate several properties. However, if the discrepancy is large, this reason is a weak foundation, and the possibility of honest misunderstanding or fraudulent representation is at once raised.

Cases arise where the fact that the property reaches a certain adjoiner marked or unmarked is of greater consequence than a few feet in its dimensions. Thus the value of a certain property along a railroad may be largely dependent upon the possibility it affords for a siding, and such an advantage may outweigh ten or even fifteen feet in depth; hence, the call or omission of the call for the railroad as an adjoiner is of the greatest consequence, and the fact that the lot is a certain number of feet in depth

[47] Graybeal v. Powers, 76 N. Car. 66, cited in Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48.

is a mere trifle. "The line of another tract which is called for controls course and distance, being considered the more certain description, and *it makes no difference whether it is a marked or unmarked or mathematical line, provided it is the line called for.* In deciding whether it be the line called for the fact of its being marked may have an important bearing."[48]

In this connection it is well to remember that this rule is merely a guide founded upon experience and derives its strength upon the fact that observation has established the line of an adjoiner as a reliable indication of intention, but where the circumstances of the particular case indicate that other calls better effectuate the intention, the foundation upon which it rests is destroyed.

[§ 169.] (b) Least Liable to Error.—"The description about which there is the *least liability to error* must be adopted to the exclusion of the other. It is equally well settled that a call for the line of another tract of land which is proved is more certain than, and shall be followed in preference to, one for mere course and distance."[49] This statement is by no means dogmatic, for it permits the exercise of judgment in each particular case to establish whether or not the line called for is "proved"; that is, determined with sufficient certainty to represent the intention.

There are two distinct possibilities of error—(1) in the writing of the description, and (2) in the field work. In regard to the first source it is generally conceded that the likelihood of mistakes in recording courses and distances is far greater than blunders in calling for adjoiners. However, isolated cases will arise where the call for the adjoiner is wrong, and if, perchance, the other calls of the deed establish that course and distance express the intention they should control, particularly in the city where

[48]Corn v. McCrary, 48 N. Car. 496.

[49]Campbell v. Branch, 49 N. Car. 313.

distance is significant and may be a controlling factor in a transaction.[50] In the open country this situation is so rare that it takes very clear expression in the deed, or strong extrinsic evidence to overcome the presumption that the call for the adjoiner is to control.

In the field the possibility of the error being in the call for the adjoiner or in course or distance is more even. The engineer's mistake may be in the assumption that the courses and distances which are correct in themselves and which correctly express the intentions of the parties have brought him to the line of another when such is not the case.[51] In such an event the call for the adjoiner is clearly erroneous. On the other hand in Fincannon v. Sudderth[52] the intention was admittedly to run with the line of the "S" tract, and the engineer understood this, but wrongly assumed a certain rock to which he measured and referred to as a monument, to be in the "S" line. Under these circumstances the call for the adjoiner rightly prevailed over course and distance as determined by the rock which was erroneously described as in the "S" line; for although the engineer had not gone to the "S" line and the party had not been put in possession up to the "S" line, it was the intention of the grantor to convey to his abutter.

In the application of the rule the fact that human blunders are not errors in the true meaning of the word, and that therefore experience merely indicates a likelihood and not a mathematical probability should be borne in mind. It is merely a guide or method of procedure to test each individual case, and where the assumption that the error is most likely in course and distance leads to a clear defeat of the intention, the rule has no application. "The reason why monuments as a general thing, in the determination

[50]See § 164, supra.

[51]Rowe v. Kidd, 249 Fed. 882, 899. See Jones v. Hamilton, 137 Ky. 253, 125 S. W. 695 (§ 84, supra); Wilson Lbr. & Mill Co. v. Hutton, 152 N. Car. 537, 69 S. E. 2 (§ 177, infra).

[52]140 N. Car. 246, 52 S. E. 579.

of boundaries control courses and distances is that they are less liable to mistakes, but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all other particulars that they were inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant."[53]

[§ 170.] (3) **Application. — (a) Lines Marked.** — The strength of the rule may well be judged by its application in Howe v. Bass.[54] Howe had acquired two pieces of property on Orange Street, Boston, Massachusetts, one with a frontage of forty-five (45) feet from Robert Calif, the second with a frontage of twenty (20) feet from J. Simpson. An executor, appointed because of Howe's insanity conveyed the property as bounded forty-five (45) feet by Orange Street and on one side by Hannah Kent heirs and on the other by Joseph Veasce. The lines of these adjoiners were visible and included between them the entire sixty-five (65) feet. The Howe heirs sued the grantee, claiming that the intention was to dispose only of the forty-five (45) feet acquired from Robert Calif, but cited no evidence to support this contention and establish no extrinsic circumstances to aid in ascertaining the intention. The court limited to the words of the deed was practically forced to hold that the entire sixty-five (65) feet passed and therefore naturally ruled in favor of the grantee.

In the decision it was set forth that dimensions play an important part in the valuation of city lots.[55] While this fact was cited to substantiate the ruling it may be argued against it. Relativity must be considered, and the magnitude of the blunder is approximately forty-five per cent of the deed dimension of forty-five (45) feet. This affects

[53] White v. Luning, 93 U. S. 514, 23 L. ed. 938.

[54] 2 Mass. 380, 3 Am. Dec. 59.

[55] See Quantity, §§ 204, 207, infra.

the value to at least the same percentage. Therefore distance is of prime importance and should control as expressed. Furthermore the frontage was not chance but represented that of a lot, an entity in itself distinct from the twenty (20) feet in controversy. The fact that the conveyance was made by the executor who naturally had less interest in the property than the owners and therefore was not as intimately acquainted with it should soften the rule that a deed is to be construed most strongly against the grantor. All these considerations suggest that the intention was to limit the grant to forty-five (45) feet.

This case is an excellent example of the value of reference to the source of title. Had the executor, in writing the conveyance, used some such phrase as "meaning to convey that parcel of land deeded to Howe by Robert Calif by deed dated ——— and recorded in book ———," the grantee would have had constructive notice of the intention as understood by the grantor, and the reason for the control of the adjoiners as monuments would fail, and the court would have been justified in giving control to distance.[56]

The case of Powers v. Bank of Oroville[57] is interesting in that in the application of the rule, the line of an adjoiner was given control over another monument, namely a street line. The deeds to both parties were out of the same grantor, and the senior conveyance, that to the plaintiff, described the north line of his lot as 57 5/12 feet from the south line of Bird Street, but it was clearly understood that the description included an enclosed lot as indicated on the ground by fences. The junior deed to the defendant conveyed the corner lot as extending from Bird Street 57 5/12 feet along Meyers St. to the lot of the plaintiff. The court held that the senior deed was con-

[56]See White v. Luning, 3 Otto (93 U. S.) 514, 23 L. ed. 938.

[57]136 Cal. 486, 69 Pac. 151.

trolling, and that title to the strip 2 10/12 feet wide to the south of the fence and in dispute rested in the plaintiff, even though subsequent surveys might locate the fence less than 57 5/12 feet from Bird Street as called for in both deeds. In reality the starting point of the measurement

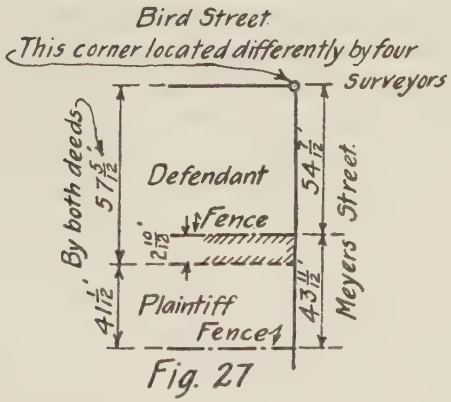

Fig. 27

yielded rather than its magnitude. The southwest corner of Bird and Meyers streets had been given four different locations by as many engineers. Hence it lacked stability and certainty and yielded as a monument to a more permanent and significant landmark—the fence recognized in the deed.[58]

[§ 171.] (b) **Lines Unmarked.—(aa) Effect of Visibility.**—Visibility is an important element in determining the degree of certainty to be ascribed to a monument. Therefore unless the attendant circumstances clearly establish to the contrary, an unmarked line of an adjoiner is an extremely weak call as evidence of the intention expressed in a deed. Thus in Koch v. Gordon[59] a deed conveying the west portion of a lot originally fifty-eight (58) feet long

[58]See § 269, infra; Doe v. Riley, 28 Ala. 164, 65 Am. Dec. 334.

[59]231 Mo. 645, 133 S. W. 609.

by twenty-six (26) feet deep from which thirty (30) feet had been sold off the east end, read essentially as follows: Commencing 26 feet west of the southeast corner of lot 5 block 27 of the county addition to the city of Rolla, being the southwest corner of said lot formerly owned by Mary Burke and where she now resides, and running thence north on a line corresponding with original survey of said block in the original plat 26 feet, thence west on a line corresponding with said survey 26 feet, or to and intersecting the northeast corner of a lot formerly owned by Andrew Malcolm and running south from said northeasterly corner of said lot formerly owned by said Andrew Malcolm to 70th St.; to place of beginning.

The deed distances created an overlap of four feet at the east and a gap of six feet at the west, which are eliminated by giving control to the unmarked adjoiners. The possibility of error is easily imagined for the distance to the beginning point and first courses are so nearly the same that the scrivener easily confused the dimensions. Furthermore as the application of a rule would eliminate a conflict there is strong basis for its application. Despite this the court noticed that no evidence was introduced to show that the lot corners called for were visibly marked and held that "corners of other lots are not real monuments which are fixed and visible objects within the rule that real monuments called for in a deed are given precedence over distances called for.[60] The action in this case involved adverse possession within the overlap, and as both lots were held by the same person at one time, many other points of law were involved in the ultimate decision.[61]

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[60]Koch v. Gordon, 231 Mo. 645, 133 S. W. 609.

See also §§ 85, 86, 120, 176(a), 177, 180.

[61]See also Buffalo, N. Y. &c. R. Co. v. Stigeler, 61 N. Y. 348 (§ 120, supra); Oregon Home Builders v. Elsman, 88 Ore. 611, 172 Pac. 114 (§ 164, supra); Magoun v. Lapham, 21 Pick. (38 Mass.) 135 (§ 164, supra).

[§ 172.] **(bb) Invisibility May be Overcome.**—The circumstances surrounding a particular case may clearly indicate the intention to take to an unmarked line as a boundary, and its deficiency as a monument will be overcome by the certainty of its call. Thus where a surveyor in laying out the "S" survey sixty-five years before called for its western boundary the east line of the "Y" survey and gave every course and distance of the latter, and the east line of the "Y"" survey while not marked could be accurately located and was not disputed, the call for the adjoiner prevailed over courses and distances which did not carry the "S" survey to the "Y" boundary.[62]

Furthermore while "an unmarked prairie line is not, in the general acceptance of the term, a visible object, and therefore in common parlance is not an object at all—if a surveyor runs such a line from its ascertained corner, the place where he locates the same on the ground does become visible to him, and therefore it may be said, not only to have the dignity of an artificial call, but to be to him an artificial object, as that term is used in reference to the law of boundary."[63]

[§ 173.] **(cc) Effect of Occupation.**—In Dolphin v. Klann[64] the bounds of a subdivided tract closed, and the survey on the ground checked several existing monuments. The ambiguity arose in connection with the second course which was described as beginning at the center line of Walnut Street and running nine hundred and fifty-four (954) feet along the right of way of—to a point on east line of the west half of S. W. ¼ of N. E. ¼ of Section 19. This east line was unmarked, and in a survey for a lot in a block adjacent to this line the surveyor had run it out and found that to reach the line the course along the rail-

[62]Steusoff v. Jackson, 40 Tex. Civ. App. 328, 89 S. W. 445.

[63]Findlay v. State (Tex. Civ. App.), 238 S. W. 956.

[64]246 Mo. 477, 151 S. W. 956.

road would have to be increased and that all lots in the block would be moved eastward. The court held that the calls for course and distance on the plat controlled the unmarked line referred to. If, however, the occupation supports the call for the unmarked line and clearly establishes that such line sustains the expressed intention of the deed, courses and distances yield.[65] Where the occupancy has not been long, its effect is lessened, and oftimes an opportunity is afforded in the application or disregard of the rule to correct errors which would defeat the intention of the deed.

In Airy v. Kunkle[66] the control of the adjoiner over course and distance resulted in clearing a confusing situation and in conveying to the grantor substantially the lot intended by the parties to the transaction. This situation

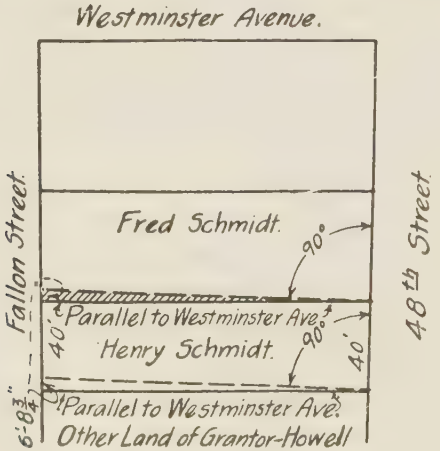

Fig. 28.

is indicated in the sketch. The difficulty arose regarding the line between Fred and Henry Schmidt. The lot at the

[65]See Holden v. Crolly, 153 App. Div. 254, 138 N. Y. S. 23 (§ 112, supra).

[66]7 Pa. Super. Ct. 112.

corner of Westminster Avenue and 48th Street and that of Fred Schmidt were described in conveyances by Howell as having side lines parallel to Westminster Avenue. A subsequent conveyance to Henry Schmidt described among other lots the one south of Fred Schmidt as forty (40) feet on 48th Street with sides parallel to each other and at right angles to 48th Street extending through to Fallen Street and called for the south line of Fred Schmidt as the north line of the property conveyed. In fact Westminster Avenue made an acute angle with 48th Street so that the lot of Henry Schmidt if taken with its north side at right angles to 48th Street overlapped the lot of Fred Schmidt with its south line parallel to Westminster Avenue. Howell still possessed property to the south so that Henry Schmidt could readily be put in possession of a lot having a uniform width of forty (40) feet, the sides parallel and extending from 48th Street to Fallen Street. Under these circumstances the court held that the call for a right angle was incorrect and superfluous, and quoted Cox v. Couch:[67] "Where land is described by course and distance and also by calls for adjoiners, the latter, where there is a discrepancy, will invariably control."

[§ 174.] **(dd) Effect of Intention.**—All rules of boundary surveying have for their purpose the ascertainment of the expressed intention of the deed, and they are to be applied or taken exception to, depending upon whether their application or disregard most certainly effectuates the intention. This principle is basic and may overcome the weakness of an unmarked line due to its lack of visibility. In the case of the Fidelity Realty Co. v. Flahaven Land Co.[68] the courses of the deed in question placed the grant entirely upon the land of Katherine Mulick named as an abutter, located the third course double the frontage from

[67] 8 Pa. 147.

[68] 193 Ky. 355, 236 S. W. 260.

the line of Kellar called for as an adjoiner, and included none of the land of the grantor. This indicated the likeli-

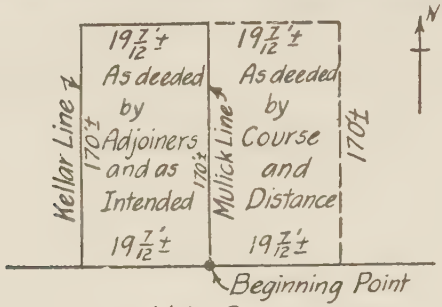

Fig. 29.

hood of an error in the courses of the first line along Main Street and the third line along the rear parallel to the street and by interchanging east and west in these courses all the calls of the deed were made consistent, the conflict entirely removed and the land conveyed was that of the grantor. The case is a most excellent example of the basic theory of the general rule, namely that a call for the line of an adjoiner is the best evidence of intention, and that the most likely error is in a call for course and distance. Therefore the court held "distances in deeds yield to courses, and both courses and distances yield to natural objects, and in this connection a boundary line of a named adjoining owner is a fixed natural object,"[69] and although the language of this decision is too inclusive for general application without qualification, it is clearly warranted in this case, for the call for the adjoiner so certainly establishes the intention of the deed, and the error is so positively located that the condition of the Kellar line, marked or unmarked, visible or invisible, is inconsequential.

[69] Fidelity Realty Co. v. Flahaven Land Co., 193 Ky. 355, 236 S. W. 260.

The same principle is found in Beach v. Whittlesey[70] although complicated by the necessity of extrinsic evidence to establish the intention. Mrs. Beach arranged with Whit-

Fig. 30.

tlesey to purchase Lot 24 for her, and at the same time he was acquiring lots 21, 22, and 23 for himself. When examining the plat in the town hall the clerk called to his attention the corner taken out of Lot 24 by Lot 40 and suggested that if this were kept in mind the deed description would be simplified by simply calling for a lot fifty by one hundred and fifty (50x150) feet without regard to the small jog. He explained this to Mrs. Beach and arranged to include with his land eight (8) feet at the rear of her lot. The deed to Mrs. Beach made presumably in accord with the clerk's advice described Lot 24 as bounded on the east one hundred and forty-two (142) feet by Albert Thomas, south fifty (50) feet by grantor, west one hundred and forty-two (142) feet by grantor, and north fifty (50) feet by Prospect Street. That to Whittlesey read: "Bounded on the north 150 feet by Prospect St. east 142 by Beach; north 50 feet by Beach, east 8 feet by Albert Thomas, south 200 feet by Hurle, west 150 feet by Hotchkiss and Durant."

[70] 73 Conn. 530, 48 Atl. 350.

Mrs. Beach did not contest her short one hundred and forty-two (142) foot line, but claimed fifty (50) feet frontage on Prospect Street which would have made her lot for the greater extent sixty-six (66) feet wide. The court held, and very rightly under the circumstances, that the west line of Albert Thomas' lot was a monument, that the Beach lot was a rectangle with a jog taken out of the north-east corner, and that the west line was parallel to and fifty (50) feet from the west line of the Thomas lot. The description was written with regard to the plat in the town office and not with regard to lines on the ground, visible or invisible, and hence an unmarked line was really the base for laying off the lot, and as such gave meaning to the intention.

The principles of establishment may modify the effect of occupancy, and where land was described as "beginning at" and "bounding on" the land of B it was held that the point of beginning was the true line of B's land and not the line of B's occupation as shown by a fence set up and maintained by B before and after the conveyance; under the mistake that it was the true line and with the consent of the adjacent owner.[71]

[§ 175.] **(4) Considerations Essential to Render Rule Operative.—(a) Line Must Be Called for in Deed.**—As it is fundamental that the construction of a deed is to be obtained from the words of the instrument itself, it follows an adjoiner can not control unless it is called for in the conveyance, and the manner in which the call is made plays an important part in the interpretation. Thus in Clement v. Bank of Rutland[72] a deed from the bank to Clement dated December 1885 read: "banking house and lot, bounded on the north by land and lot of Frederick Chafee,

[71]Cleaveland v. Flagg, 4 Cush. (58 Mass.) 76; Smith v. Vermont Marble Co., 99 Vt. 384, 133 Atl. 355. See also Establishment, § 321.

[72]61 Vt. 298, 17 Atl. 717.

on the east and south by land and lot of Michael Quinn, and on the west by Merchant's Row ——— for more particular description of said lot reference is to be had to report and plan made by J. J. R. Randall, Nov. 22, 1878." This report showed Quinn's line to be two inches south of the south face of the south wall of the bank. In July 1879, the bank had conveyed to Quinn an eight inch strip so that in 1885 at the time of the conveyance to Clement, Quinn's north line ran through the center line of the south bank wall. This raises the question whether the call for Quinn as an adjoiner is for his true line as of 1885 or as prior to 1879 as indicated on the plat. The conveyance distinctly says "for more particular description of said lot reference is to be had to report and plat of 1878." Therefore, by placing himself in the seats of those who wrote the conveyance the judge was forced to take the adjoiner as shown on the plan as the line called for and to rule that the conveyance carried the grant to Clement to a line two inches south of the south side of the bank wall, and not to the center line which became the line of Quinn in 1879.

Furthermore the reference to the adjoiner must be clear.[73] Thus in Waters v. Dennis Simmons Lbr. Co.[74] the matter of punctuation played an important part. The conveyance in question read: "Beginning at a pine and running S 41 ½°W 12 3/5 chains; thence S 20 ½°W 18 ¼ chains, along Morris Line S 16 ½ chains, thence etc., etc." The Morris line ran N 67 ½°W. The ridiculous contention was that the first course extended to the Morris line, and that, as an adjoiner, the latter controlled the distance of the first course, and both course and distance of the second; but the court held that in view of the fact that the first course failed to mention the Morris line, and that the Morris call was separated from the second

[73]Matthews v. Thatcher, 33 Tex. Civ. App. 133, 76 S. W. 61.

[74]154 N. Car. 232, 70 S. E. 284.

by a comma, it could not be taken as a part of the second, and hence to govern course and distance must be considered as a part of the third call.

[§ 176.] **(b) Line Must Exist When Call is Made.**—The call for an adjoiner can not control unless the line exists at the time of the conveyance. Where the line of the block called for was not shown to be in existence, the rule that a call for a marked line of an older survey will prevail over a distance call has no effect, and where it appears that the line of the second block was not marked by natural or artificial monuments, that call can not as a matter of law prevail over calls for course and distance.[75] However, the fact that no stakes are to be found at the time of the controversy does not in itself sustain the assumption that the line was unmarked at the time of the survey. "In the absence of proof to the contrary it must be assumed, * * * that the stakes placed by the surveyor to mark the corners * * * were of such kind as to have been of reasonable permanency, and it is fair inference that these stakes were in existence at the time [seven years later] the * * * survey was made and were the stakes called for in the field notes of the survey. The fact that they are not in existence now 48 years after they were placed will not justify the holding, as a matter of law, that at the time the * * * survey was made the * * * line was an unmarked line."[76]

[§ 176a.] **(c) Line Must Be Certain and Locative.**—The very foundation of the rule giving control to calls for adjoiners is the certainty of such lines as compared with course and distance and quantity, and therefore where the line of the adjoiner can not be located with reasonable

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[75]Love v. Jones (Tex. Civ. App.), 138 S. W. 1128.

[76]Wolf v. Scott (Tex. Civ. App.), 253 S. W. 905.

accuracy the rule can not be applied.[77] Thus in Guitar v. St. Clair[78] it was held a subdivision line between two tracts of land which was the center of a certain section, and which was invisible, ascertainable only by measurement, and liable to differ in location according to the result of surveys, was not a monument. In the case of Hill v. McConnell[79] the necessity of certainty for the operation of the rule is particularly evident. Two adjacent properties had a deed frontage on the street of eleven (11) and fifteen and one-half (15½) feet, but were listed on the assessment books as twelve and one-half (12½) and fourteen (14) feet. In the tax sale the smaller of these lots was described as "beginning on southwest side of Pennsylvania Ave. 86 6/12 feet from Sewell St. at southeast corner of lot (owner unknown) thence southeast 12 6/12 feet to a lot (owner unknown)." These calls for adjoiners are not locative, and to give them effect reference must be had to the city map or the county records. It is clear that the conveyance was made with regard to the data on the assessment books, and the calls for course and distance locate the grant without reference to extraneous sources. Therefore the court rightly held that "a call for a deed for an adjoining lot by a designation so vague and uncertain as to be incapable of definite ascertainment will not control course and distance."

[§ 177.] **(5) Exceptions.—(a) Effect of Intention and Error.**—The purpose of the rule is to aid in ascertaining the intention of the conveyance, and it can not be applied except for this purpose. Whenever the circumstances indicate that course and distance comply with the intention of the parties, and that the call for the adjoiner is made erroneously, or upon conjecture, the latter must yield.[80] Thus

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[77]Taylor v. Higgins Oil & Fuel Co. (Tex. Civ. App.), 2 S. W. (2d) 288.

[78]238 Mo. 617, 142 S. W. 291.

[79]106 Md. 574, 68 Atl. 199.

[80]Standefer v. Vaughn (Tex. Civ. App.), 219 S. W. 484.

in Wilson Lbr. & Mill. Co. v. Hutton[81] a call in a grant was for one hundred poles to a stake in the Morris line, which the evidence revealed was unmarked and unknown at the time of the survey. Furthermore the grant had been recognized as a rectangle one hundred (100) by eighty (80) poles, and no attempt made to extend its boundaries until shortly before the trial when the Morris line was ascertained, and then an effort was made to extend the distance two hundred and seventy-four (274) poles to the line so established. The court held that inasmuch as the Morris line was unknown to the surveyor, reference to it was made upon conjecture, and the course and distances which included the stated area of the grant more certainly expressed the intention and prevailed over the call for the adjoiner. It is interesting to note that two of the five judges hearing the case dissented on the grounds that in the particular jurisdiction calls for adjoiners were always given precedence over course and distance.

The weakness of this regard for precedents is clearly brought out by contrasting this case to that of Fincannon v. Sudderth[82] where the general rule was rightly applied. In both, the conflict arises from the surveyor considering himself in the line of an adjoiner when in reality he is not. At this point the cases may be differentiated, for in the one it was admittedly the intention to convey to the line of the adjoiner, while in the other the evidence strongly indicates that courses and distances represent the true intention. It is therefore clearly apparent that no fixed and inflexible criterion can be established to cover both cases; and that to give justice, the intention, as clearly established in each case, must be permitted to prevail over inherited rules, regardless of their foundation. Formulas, whether they be derived by the process of mathematics or established as

[81] 152 N. Car. 537, 68 S. E. 2.

[82] 140 N. Car. 246, 52 S. E. 579. See § 169, supra.

rules of experience need thought in their application, and unless the man who applies them has the necessary experience and judgment to modify them according to conditions, they are positively dangerous. This is particularly true regarding the rules of surveying, and while the surveyor should remember that he is without authority and can not establish precedents,[83] yet he should be able to see wherein the case under consideration differs from others which have been before the courts.

[§ 178.] (b) Effect of Necessity to Depart from Calls. —Furthermore no departure can be made from the description of a deed except to enforce its true intention as evidenced by the document itself, read in the light of the existing circumstances at the time of its execution. If the call for an adjoiner necessitates violation of this principle, the application of the rule would defeat its purpose, and hence has no force.[84] In Albertson v. Chicago Veneer Co.[85] a grant read in part as follows: "S. 75°E. 80 poles to a stake on the Thomas Upchurch's line, and with the same S. 8½° W. 400 poles to a stake on Emsley Bertram's line." As a continuation of Upchurch's line did not come within gunshot of Bertram's property radical departure from description by course and distance would be necessary to give the call for the adjoiner effect. The courses and distances following those quoted reached the landmarks called for and all circumstances indicated that they accurately defined the footsteps of the surveyor. Under these circumstances the court held that the call for the adjoiner was made erroneously, and that several uncalled for courses could not be followed to give it effect, and that the courses and distances as witnessed by natural monuments were more certain and prevailed over the call for the adjoiner.

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[83]Turner v. Creech, 58 Wash. 439, 108 Pac. 1084.

[84]See § 17, supra.

[85]177 Ky. 285, 197 S. W. 831.

[§ 179.] **(c) Effect of Actions of Parties at Time of Transaction.**—The rule "that when a monument or marked line is called for and the distance as given in the deed will not reach it, the distance must be disregarded and the line run to the monument or marked line," is not "applied when to do so would do violence to the actual location of the line."[86] Thus when the actions of the parties at the time of the transaction or in taking possession indicate that the call for adjoiner is in conflict with the agreed intention as expressed by the actual location, the rule naturally yields. In Brolaskey v. McClain[87] the superior court held that the lower court erred in the rigid application of the rule, because of its failure to regard these circumstances. Both parties to the action traced their titles back to a common grantor, Peters, and the decision rested upon the validity of a certain deed as determined by the interpretation of a prior deed. In December, 1790, Peters received by a court order a lot "situated on the south side of High St. between the Third and Fourth streets from the Schuykill containing in front on said High St. 238 feet, and in length or depth 306 feet, bounded on the east by Fourth St. on the south by back ends of Chestnut St. lots, west by Herbert Springett's lot and north by High St." In 1808 Peters conveyed to one Poyntell a predecessor in title to the defend-

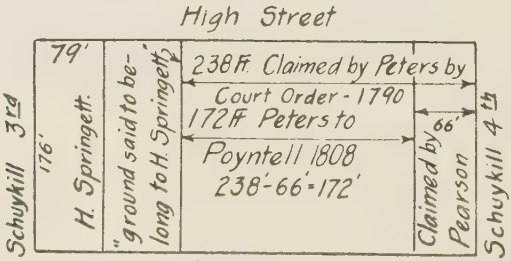

Fig. 31. (a).

[86]Rudolph v. Sales, 32 Ky. L. 475, 105 S. W. 975.

[87]61 Pa. 146.

ant as follows: "A lot on the south side of High St. between Schuykill, Third, and Fourth, containing in front on High St. 172 feet, in depth 176 feet to a 25 foot court, bounded on the west by ground *said* to belong to H. Springett and others, on south by aforesaid court, east at a distance of 66 feet from west side of Schuykill Fourth by other ground of Peters, and north by High St." At the same time Peters conveyed to Neilson the lot south of the court, one hundred seventy-two (172) feet frontage and one hundred five (105) feet depth by a very similar description except that its western adjoiner was definitely stated as H. Springett's lot.

In 1814 a decision of the real estate board gave the frontage on Schuykill Fourth Street to one Pearson and established the depth of these lots as sixty-six (66) feet. It likewise cited that Peters' property abutted Springett. This explains the origin of the one hundred seventy-two (172) foot frontage on High Street. In 1809 Peters and Pearson were evidently disputing the sixty-six (66) feet adjacent to Fourth Street, and Peters did not care to give a warranty deed conveying this portion, nor would he concede it to Pearson. In the conveyances he gave two hundred thirty-eight (238) feet less sixty-six (66) feet, or one hundred seventy-two (172) feet, bounding the property on the east by other land *belonging to himself.* The board decided against him and in 1823 he obtained from the Commonwealth a patent for a tract fronting on High Street two hundred thirty-eight (238) feet, three hundred six (306) feet deep, extending from the rear of the Pearson lots sixty-six (66) feet west of Schuykill Fourth to the property of H. Springett. That is, the patent included the same area as the court order, but moved the lot westerly sixty-six (66) feet. As Peters gave Poyntell a warranty deed, the effect of this would be to strengthen the latter's title to whatever land his deed conveyed. In 1827 Peters learned

that the frontage on High Street was in reality three hundred ninety-six (396) feet, of which two hundred fifty-one (251) feet was between the recognized lines of Pearson and Springett, and conveyed to James Kerr, a predecessor in title of the plaintiff, a lot as follows:—"situated on the south side of High St. at a distance of 79 feet eastward from Schuykill Third containing in front on said High St. 79 feet, and in length or depth that breadth 306 feet bounded northwardly by said High St. westwardly by a lot now or formerly H. Springett, and eastwardly by ground for-

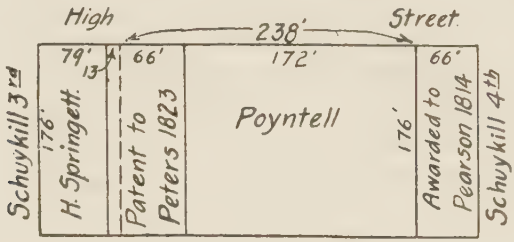

Fig. 31. (b).

merly R. Peters and partly by head of a 25 foot court, etc. etc." The land in question was a strip about twenty-five (25) feet wide along the Springett line, and the issue depended upon whether or not the deeds from Peters to Poyntell and Neilson covered it and carried these grants to the Springett line; for if so the deed of Peters to Kerr was void and the plaintiff had no claim.

An important element in the problem is the interpretation placed upon the deeds by both Poyntell and his heirs. He had never claimed beyond one hundred seventy-two (172) feet, and when the estate was partitioned (1830) the heirs accepted four forty-three (43) foot lots and asked for no more. The lower court based its ruling on the language of the deed itself, and did not consider these extrinsic facts, and omitting these there is much logic to the decision. In 1808 when Peters conveyed to Poyntell he clearly bounded

the land on the west by Springett. The words "and others" could not be interpreted to mean himself, for if he were retaining any land adjacent to Springett he would have known it and so stated. In 1814 he lost his dispute with Pearson and the patent of 1823 strengthened the warranty deed he gave to Poyntell. The deed to Kerr in 1827 could convey no land according to the calls for adjoiner, for Poyntell had prior title from Pearson's line on the east to

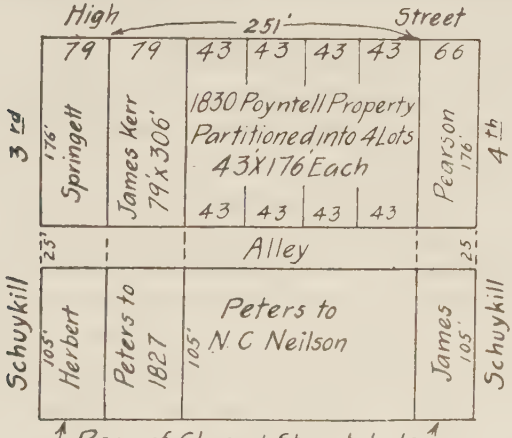

Fig. 31 (C).

Springett's land on the west. These conclusions are in perfect harmony with the deeds, and the control given to the call for the adjoiner apparently gives effect to the intentions of the parties, and the rule is therefore applicable. It is only when we consider the overt acts of the parties at this time, years prior to this litigation, that the error in this reasoning is apparent. Poyntell and his heirs claimed to another line which they understood to be the Springett line, and to which Peters had evidently put him into peaceful possession. Not until 1827 did Peters learn of his error and claim the seventy-nine (79) feet which he conveyed to

Kerr. Poyntell was content, indicating that he had possession of all that he had bought. These circumstances indicate that the parties had in mind the line as fixed by distance (172 feet) and were mistaken in assuming the west line of the property conveyed to Poyntell being Springett's east line. Therefore it is clear that the call for the adjoiner is wrong, and the lower court erred in the rigid application of the rule, without regard for the interpretation the parties concerned had placed upon the deed, and the ratification of this construction by the heirs.

The important point in this decision is the necessity of ascertaining and considering all the facts regarding a given situation. If the circumstances were cited without mention of Poyntell's interpretation and his contentment with the deed frontage of one hundred seventy-two (172) feet, the ruling of the lower court would be sound. The aspect of the entire problem is changed when the extrinsic facts are considered. Therefore in looking up decisions upon which to base action it is very important to see that they closely approximate the case at hand. Slight variations may bring in new considerations which materially change logical conclusions.

[§ 180.] **(d) Effect of Line Being Unmarked.**—While the rule giving adjoiners control over courses and distances is extended to unmarked lines, these have no peculiar property which imparts to the survey establishing them greater certainty than is possessed by the lines run out by the courses and distances of the survey based on the deed making the call for the adjoiner. Justice Fisher of the Texas Court has said, "The call of an undefined and open line of the adjoining survey is, in the Maddox case,[88] by force of a presumption, given the effect of an 'artificial object.' The creation and establishment of this 'artificial ob-

[88]Maddox v. Fenner, 79 Tex. 279, 15 S. W. 237.

ject' is purely a legal fiction which is, more often than otherwise, only conspicuous and prominent by its absence. The logic is that by force of a legal fiction you will assume the surveyor has in fact established a line, when, as a fact, it can not be found, and give this assumption a force and superiority over another call made by the same surveyor, course and distance,—which may with certainty be established, and found to exist as a fact, without reliance for its existence upon any legal fiction or presumption."[89]

These considerations necessitate that the unmarked line to come within the application of the rule must clearly express the intention of the deed, and must be of unquestionable certainty. In the early Texas decisions only marks upon the ground were recognized as sufficient to establish the identity and certainty of lines, and in Duff v. Moore[90] where the general rule was acknowledged, it was held that "if there be no objects natural or artificial to show the line, the presumption (that the surveyor identified the line called for by marks on the ground, and hence the mistake occurred in the measurement or calculation of course and distance) does not obtain, and the rule (that the line of an adjoiner controls) no longer applies."

In Rowe v. Kidd[91] the court recognized that while the call for a fixed and ascertainable line will control regardless of its visibility or invisibility, if the line (that is, of the adjoiner) has actually been run out, the rule did not apply where the engineer had merely run the course and distances set forth without establishing the line called for as a boundary. This is logical because under the latter circumstances, the courses and distances are the best evidence of the engineer's footsteps, and the error is most likely in assuming that the ideal and invisible line called for but not given

[89]Fisher, J., in Ware v. McQuinn, 7 Tex. Civ. App. 107, 26 S. W. 126.

See also §§ 85, 86, 120, 171, 176(a), 177.

[90]68 Tex. 270, 4 S. W. 530.

[91]249 Fed. 882, 899.

practical location is where he supposed it to be. This of course does not hold where the survey is merely protracted in the office.

In Gerald v. Freeman[92] an unmarked line is definitely made an exception to the general rule. The court held "but the former (course and distance) will not be made subordinate to an unmarked prairie line, which could not itself be ascertained except by running the boundaries of another survey by course and distance." This is logical in that it recognizes that the unmarked line of an adjoiner is deficient in the essential characteristics of a monument, namely visibility, certainty and independence. It is arbitrary in that it dictates that courses and distances are to be followed without due regard to their relative certainty as compared with the calls rejected.

In Maddox v. Fenner[93] is found the first suggestion that the exclusion of a line from the application of the rule is a question of certainty and intention rather than the condition of the line, marked or unmarked. The court here announced that "whether or not course and distance shall yield to the unmarked line of another survey which is called for does not seem to be entirely settled, and probably no general rule can be safely anonunced."

In Herman v. Thomas[94] it was definitely stated that the rigid exception of unmarked lines as stated in Gerald v. Freeman[95] had been somewhat limited and that "when the unmarked line can be ascertained with accuracy, and there is an absence of evidence as to how the survey was made and there arises a controversy as to whether course and distance or the unmarked line of another survey shall prevail, there is no reason why the survey should not be given

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[92]68 Tex. 201, 4 S. W. 256.
[93]79 Tex. 279, 15 S. W. 237.
[94](Tex. Civ. App.), 168 S. W. 1037.
[95]68 Tex. 201, 4 S. W. 256.

the dignity of an artificial object and prevail over course and distance."[96]

It should be carefully noted that unless the unmarked line called for as an adjoiner can be accurately located, exception must be taken to the general rule. The situation can perhaps best be understood by accepting the call for the adjoiner as a monument which, as the line is unmarked, possesses no dignity. The entire conflict is then between the calls of the deed describing the line of the unmarked adjoiner and the courses and distances of the deed establishing the unmarked line in question as an adjoiner. This is to be settled by whatever rules may be involved, so as to comply with the intention as effectively expressed in the deed.

[§ 181.] **(B) Over Quantity.—(1) The Rule.**—Calls for quantity must yield to the more certain and locative lines of the adjoining owners,[97] for quantity depends upon measurement, calculation, and is often a mere guess, and hence is universally regarded as too indefinite to control matters susceptible of more certainty, such as boundaries.[98]

[§ 182.] **(2) Application.**—A particularly interesting application is found in Koch v. Dunkel[99] where the courses and distances confirmed the call for quantity. In November 1867 Dunkel conveyed to John Cameron three (3) acres and thirty-eight (38) perches off the north side of a farm of sixty-two (62) acres seventeen (17) perches deed measurement. Cameron immediately fenced this off and the following May, Dunkel contracted to sell to Koch sixty (60) acres more or less. The deed Koch was later given followed the lines of the farm as cited in Dunkel's deed and gave

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[96]See also Wolf v. Scott (Tex. Civ. App.), 253 S. W. 905 (§ 176, supra).

[97]Veve v. Sanchez, 226 U. S. 234, 57 L. ed. 201, 33 Sup. Ct. 36, citing Bartlett Land Co. v. Saunders, 103 U. S. 316, 26 L. ed. 546.

[98]Gourdin v. Davis, 2 Rich. L. (S. Car.) 481, 45 Am. Dec. 745.

[99] 90 Pa. 264.

the area as sixty-two (62) acres seventeen (17) perches, but distinctly called for the land of Cameron as an adjoiner. Koch actually had peaceful possession of fifty-eight (58) acres one hundred twenty-eight (128) perches, and claimed the land conveyed to Cameron the fall previous on the grounds that it was included within the courses and distances of the deed, that it was necessary to give him the area called for in his deed, and that the call for the line of Cameron was a call for another line of Cameron elsewhere, and not the line recently acquired to and fenced. The court held that the Cameron line referred to was the line as of date of deed, and not a former limit of his property and that the call for this line controlled both the courses and distances and the area erroneously copied from a prior deed.

A review of the case leaves one with a feeling that justice was duly administered, and that Koch received all that Dunkel intended to convey. Nevertheless it is hard to conceive how a grantor can make such an error. It does seem that when a part of the original farm had been deeded out so recently and was recognized as no longer a part of the tract by using it as a call for an adjoiner, the grantor would be on his guard and modify the old courses and distances accordingly. Under the circumstances Koch might well be excused if he felt that Dunkel had misled him in regard to the extent of the grant.

VII. METES AND BOUNDS.

[§ 182.1] "By metes in strictness may be understood the exact length of each line and the exact quantity of land in square feet, rods or acres. It would be going too far to require that this should be set forth in every levy. The legislature intended that land should be described with such certainty that there could be no mistake as to its location.

Metes result from bounds, and where the latter are definitely fixed, there can be no question about the former."[1] Boundary lines or "bounds" are defined as the legal and imaginary lines by which different parcels of land are divided.[2] Courses and distances are but evidence and records of the lines of a survey,[3] and it is questionable whether or not they come within the above definition of boundary lines, and in Wood v. Ramsey[4] where it was held that metes and bounds always control course and distance, the inference is that the latter are not synonomous with the former. Lines of adjoiners are established as satisfying the definition in Moore v. Walsh[5] where it was held that when a tract is bounded on lands of other named persons these lands are the metes and bounds of the tract. Likewise monumented lines are within the definition, for, from the theory set forth in Buck v. Hardy[6] it appears that a description to be classed as one by metes and bounds must set forth the boundaries by distinctive calls independent of measurements. That is, the metes being a function of the bounds may be omitted, but never the "bounds" which when set forth with certainty fix the former.

These considerations establish that metes and bounds need not be considered as a distinctive class of calls in the consideration of conflicting elements.

VIII. CONTROL OF COURSE AND DISTANCE.

[§ 183.] **(A) General.**—When it is considered that the marks on the ground constitute the survey, and that courses and distances are but evidence and record thereof,[7] and that "when there are no natural boundaries and the

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[1]Buck v. Hardy, 6 Greenl. (6 Maine) 162.

[2]1 Words and Phrases, First Series 852.

[3]Gordon v. Booker, 97 Cal. 586, 32 Pac. 593.

[4]71 Md. 9, 17 Atl. 563.

[5]37 R. I. 436, 93 Atl. 955.

[6]6 Greenl. (6 Maine) 162.

[7]Hall v. Tanner, 4 Pa. 244, 45 Am. Dec. 686.

stakes of the original survey are gone, the lines of ancient fences and long continued occupation of adjacent lots in the same block have greater probative force than mere measurements of courses and distances,"[8] the limited control of the latter is clearly established.

However the courts in grading the dignity of the different classes of calls usually found in deeds descriptive of land intended only to establish a rule for arriving at the location of boundaries actually established at the time the original survey was made, and the rule that monuments and natural objects are superior to courses and distances does not impeach the sufficiency of course and distance to locate a boundary, but course and distance must yield to the superior grade in case of conflict.[9]

[§ 184.] (B) **The Rule.**—It is generally recognized that the control of course and distance is primarily negative, and therefore it follows that courses and distances control only when

(a) There are no calls for natural or artificial monuments, lines marked and surveyed, or adjoiners;[10]

(b) The monuments or lines called for can not be located[11] or identified;[12]

(c) The monuments or lines called for were referred to erroneously[13] or upon conjecture[14] or are impossible calls,[15] and therefore compliance with them would defeat the evident intention expressed in the deed.[16]

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[8]Galesville v. Parker, 107 Wis. 363, 83 N. W. 646.

[9]Jaggers v. Stringer, 47 Tex. Civ. App. 571, 106 S. W. 151.

[10]Hamilton v. Blackburn, 43 Tex. Civ. App. 153, 95 S. W. 1094.

[11]Wood v. Ramsay, 71 Md. 9, 17 Atl. 563.
See § 100, supra.

[12]Bell County Land & Coal Co. v. Hendrickson, 24 Ky. L. 371, 68 S. W. 842.

[13]Johnson v. Archibald, 78 Tex. 96, 14 S. W. 266, 22 Am. St. 27.
See § 118, supra.

[14]Sanborn v. Gunter, 84 Tex. 273, 17 S. W. 117, 20 S. W. 72.

[15]Security Land & Exp. Co. v. Burns, 193 U. S. 167, 48 L. ed. 662, 24 Sup. Ct. 425.

[16]King v. Watkins, 98 Fed. 913.

In regard to the application of the above rule to cases involving lost monuments, it should be borne in mind that "if monuments called for have been lost or removed, the places where they were originally located may be shown by parol or other competent evidence, and if proved to the satisfaction of the jury by a fair preponderance of evidence, these original locations will prevail over courses and distances,"[17] but a subsequent survey calling for lines of an older one is not a monument of the latter, and the call therefor is only a circumstance, admissible under some conditions as evidence of the location of the lines of the older survey.[18] In general the calls for the monuments of a junior survey abutting an older tract can substantiate but not contradict the monuments of the senior survey, and when there is conflict, the lines of the older tract are best established by courses and distances from acknowledged monuments of the older survey, and when one or more monuments of a tract of land have been ascertained, the courses and distances are entitled to controlling effect in the location of others as to the identity of which the evidence is slight, circumstantial and conflicting.[19]

[§ 185.] (C) Application.—(1) Where No Superior Call Is Made.—In the case of Andrews v. Pitts[20] the necessity of incorporating a call for a monument in a deed description is illustrated. A boundary line in dispute was regarded by a party in the action as running between two large mill stones not referred to in the conveyance. In support of this contention he offered the evidence of an elderly man whose father had owned the property some

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[17]Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 672.
See § 132, supra.

[18]Lewis v. Yates, 72 W. Va. 841, 79 S. E. 831, 62 W. Va. 575, 59 S. E. 1073.

[19]Palmer v. Magers, 85 W. Va. 415, 102 S. E. 100.

[20]126 Md. 328, 95 Atl. 203. See § 116, supra. Call made erroneously, Johnson v. Archibald, 78 Tex. 96, 14 S. W. 266, 22 Am. St. 27.

years before and had pointed out one of the stones and told him of the second. The witness after an absence of some thirty years readily found the first stone, which was near an old mill then in ruins, and measuring from this, located the second, of which he knew but had never seen. The evidence strongly indicated that these stones were found exactly where the father of the witness said they were. The court held where a corner or a boundary is established at a point before lines in dispute are reached, a survey may begin at such a point instead of going back to the beginning of the tract, but to assume that a stone not called for in any of the descriptions, and not explained beyond the then owner's statement that a "boundary stone on the mill site property" is the beginning of a certain line or tract, and to then run the lines in dispute based on that assumption is an improper method of survey. Courses and distances prevailed over these particular stones although they were found on the line in dispute.

[§ 186.] (2) **Where Location or Identity Is Doubtful.** —In Andrews v. Wheeler[21] a call in a deed was merely for the corner of a lot as shown by a designated map, and evidence referring to stakes set by others in making surveys of adjoining lands was held inadmissible as it did not identify monuments set by the surveyor in making the survey for the map referred to. In Jaggers v. Stringer[22] the identity of a monument was extremely doubtful. The course and distances called for a parallelogram of definite sides, and in one corner a post oak was called for as a witness, bearing and distance being given. An appreciable distance off a decayed oak was found fallen on the ground, but too rotted to identify as the witness in question. Certain parties testified to finding indications of a marked line connecting this point with an acknowledged corner, but

[21] 10 Cal. App. 614, 103 Pac. 144.

[22] 47 Tex. Civ. App. 571, 106 S. W. 151.

such a line was clearly at variance with the deed description, for it was not parallel to the opposite side. The court held that the evidence was too insufficient to establish the monument, and that where the surrounding circumstances show that the superior marks were placed by inadvertance, or that there was a verbal mistake in the description of the monument or natural object, the general rule does not apply, and courses and distances prevail.

[§ 187.] **(3) Where Call Is Erroneous.**—In Security Land & Exploration Co. v. Burns,[23] a call for a lake some one-half mile distant yielded to course and distance which closed and gave the precise quantity of the survey because, although a natural monument, it was admittedly an impossible and erroneous call. Whenever a call for a line is made erroneously or without knowledge of its location, courses and distances given in the deed should prevail.[24]

Thus in Pinney v. Winsted,[25] Pinney conveyed to the borough a small parcel described as follows: "Beginning in the line between lots of F. B. Catlin and Augusta and Lucien V. Pinney, at a point about 50.68 feet distant westerly from the southwest corner of F. B. Catlin's block, 27.2 feet distant from the southwest corner of F. B. Catlin's house, and 24.25 feet from southeast corner of said Pinney's house on the northerly side of Main street; thence S. 6°57′W. 5.2 feet in said line between Catlin and Pinney to said Pinney's southerly line; thence N. 86°W. in said Pinney's southerly line 52.3 feet to easterly line of Union street; thence in easterly line of Union street N. 16°14′ E. 4.55 feet to a point distant 28.55 feet from the southwest corner of said Pinney's house and 37.08 feet from the southeast corner of J. H. Alvord's block; thence S. 86°51′ E. 51.45 feet to place of beginning; containing 250 square feet."

[23]193 U. S. 167, 48 L. ed. 662, 24 Sup. Ct. 425.

[24]See also Lines of Adjoiners, §§ 176a, 177, 178, supra.

[25]79 Conn. 606, 66 Atl. 337.

The conflict in this description is made apparent in the sketch where the south line of the grant as established by the courses and distances is eleven (11) feet north of the south line claimed by the Borough as established by the call for Pinney's south line. The pertinent circumstances are the certainty with which the parcel conveyed was de-

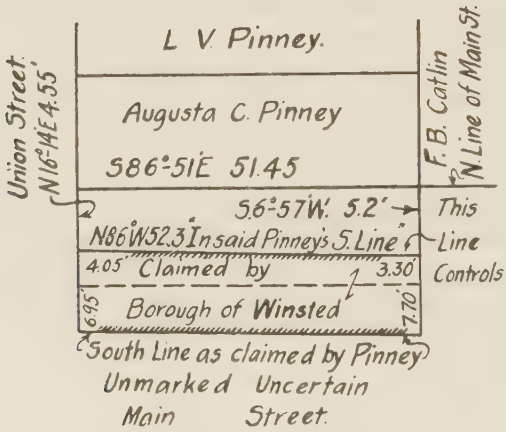

Fig. 32

scribed, and the absence of any evidence that the Pinney south line was established. In the first place the ends of the last course were referenced and careful measurements taken to include the ground intended. The distances involved are short, and there can be no likelihood of an error amounting to more than the width involved.[26]

The only possible uncertainty is the correctness of the call for the boundary, the Pinney line. The rule that when a monument or marked line is called for, and the distance as given in the deed will not reach it, the distance must be disregarded and the line run to the monument or marked line, is not applied when to do so would do violence to the

[26]See Davis v. Rainsford, 17 Mass. 207; also Vanderbilt University v. Williams, 152 Tenn. 664, 280 S. W. 689; Pritchard v. Rebori, 135 Tenn. 328, 186 S. W. 121.

actual location of the line.[27] In this case the actual location made by the parties is unusually clear, and to allow an unmarked and unknown and argued line which has less dignity than a monument to change such location would be to defeat the intention, and the case is clearly an exception to the general rule as stated in Reusens v. Lawson[28] where it was held that in questions of boundary, natural objects called for, marked lines, and reputed boundaries well established, should be preferred in identifying land to course and distance.

IX. CONTROL BETWEEN COURSE AND DISTANCE.

[§ 188.] **(A) General.**—The basic principle underlying all rules of construction is to give control to that which is the most certain and which most likely expresses the intention of the parties to the transaction. It is axiomatic that the relative precision of two calls is inverse to their relative probable error, but this theory is of little aid in ranking the control between course and distance for the reason that they are both observed quantities, each liable to error in field determination and in recording. Attempts to rate the calls according to precision must recognize two situations. In the open country where distances are long, the topography rough, and land values low, chain bearers are apt to be inaccurate; the possibility of error in counting chain length is present; misunderstandings are likely in reporting values, and errors in recording may be made. On the other hand, the angles or bearings are observed by one man, working under easier conditions, and usually keeping the notes. Therefore in such surveys courses are less likely to error than distances. In the city where the ground is graded, distances are comparatively short and significant, and land values are high, there is no reason to assume that

[27]Rudolph v. Sales, 32 Ky. L. 475, 105 S. W. 975.

[28]91 Va. 226, 21 S. E. 347.

distances are more subject to error than angular measurements.

Attempts to frame a rule to give that which most likely expresses the intention control lead nowhere, for courses and distances are merely a method of describing lines, and therefore have no physical existence, but only mathematical significance, meaning nothing to the layman, and but little to the engineer until they are laid upon the ground or platted to scale and checked for error of closure. Any error is latent until it is revealed by actual survey or mathematical calculation.

[§ 189.] **(B) The Rule.**—While there is authority for giving calls for course control over a conflicting one for distance,[29] in many jurisdictions it is recognized that the law can not satisfactorily determine in all cases whether course or distance shall control, when they do not correspond; that this must be determined by concurring testimony and the circumstances of each particular case, and that the one that convinces the judgment the most must be selected.[30]

"It may be laid down as a universal rule that course and distance yield to natural and ascertained objects. But where these are wanting, and the course and distance can not be reconciled, there is no universal rule that obliges us to prefer the one to the other. Cases may exist in which the one or the other may be preferred upon a minute examination of all the circumstances."[31] In general "the true rule seems to be that one or the other shall be pre-

[29]United States v. State Inv. Co., 264 U. S. 206, 68 L. ed. 639, 44 Sup. Ct. 289; Ewart v. Squire, 239 Fed. 34, 36; Brashears v. Joseph, 32 Ky. L. 1139, 108 S. W. 307; Morgan v. Renfro, 124 Ky. 314, 99 S. W. 311.

[30]McClintock v. Rogers, 11 Ill. 279.

[31]Preston v. Bowmar, 6 Wheat. (19 U. S.) 580, 5 L. ed. 336, cited in Davis v. Commonwealth Land & Lbr. Co., 141 Fed. 711, 765.

ferred according to the manifest intent of the parties and the circumstances of the case."[32]

[§ 190.] (C) Application.—(1) Effect of One Element Being Uncertain.—In Iverson v. Swan[33] a deed called for a line at right angles to a street to connect with a second line "about 50 feet long." When the line was laid off at right angles to the street it made the rear line fifty-three and one-half (53.5) feet long, and as the distance was approximate it yielded to the definite call for the right angle.

[§ 191.] (2) Effect of Occupancy.—The manner in which the parties to the transaction interpreted the deed at the time may determine whether course or distance is to control. Thus in Davies v. Wickstrom[34] a deed read in part, "thence N 30°26'W twenty (20) chains to a point on Puget Sound; thence N 47°E along the shores of Puget Sound six (6) chains six (6) links to the mouth of a small brook."

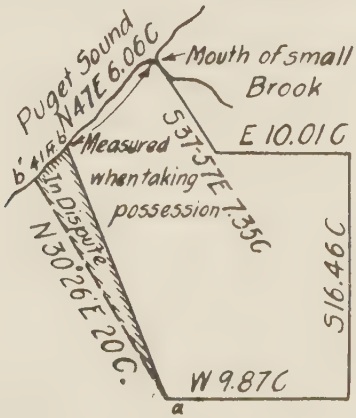

Fig 33

[32]Green v. Pennington, 105 Va. 801. 54 S. E. 877, citing Lee (J) in Smith v. Chapman, 10 Gratt. (Va.) 445.

[33]169 Mass. 582, 48 N. E. 282.

[34]56 Wash. 154, 105 Pac. 454, 134 Am. St. 1100.

When possession was taken the parties determined the first mentioned course (AB) by measuring back six chains and six links from the mouth of the small brook. Subsequently a survey was made and the line in question was located by bearing as AB′ leaving a a triangular piece ABB′ in dispute. It was clearly established that the parties took possession by measurement as above described, and as this was the practical location, representing their understanding of the deed, the call for distance prevailed over the conflicting course. The case of Scott v. Weisburg[35] is somewhat similar. A tract had been conveyed to Angel by Bell as follows: "N 52°W with west line of 5th St. 192 feet, S 38° W 350′ to 6th St. 191 feet along 6th St., and along Marlboro St. to point of beginning." Angel immediately built a fence along the second course and later conveyed the entire plat to Wiley Jones who sold to Scott a lot on 6th Street adjacent to the fence, described as fifty (50) feet on 6th Street running back N 38° E one hundred sixty-five (165) feet,

Fig. 34.

and put Scott into possession by setting stakes fifty (50) feet from the fence. Later Weisburg acquired the remainder of the Angel lot, and the question regarding the

[35] Tex. Civ. App. 46, 21 S. W. 769.

location of the Scott lot arose. If the original conveyance to Angel was followed the course of the second line (S 38°W) would make it cut 6th Street some thirty (30) feet east of the fence, reduce the distance (191) on 6th Street, and move the entire Scott lot eastward the same amount. The court held that the fence was evidence of the construction placed upon the Angel deed, and that it gave the distance along 6th Street control over the course of the second line as was the evident intent of the parties.

[§ 192.] (3) **Effect of Evident Error.**—Furthermore when the course is clearly in error it must yield to distance. Thus in Combs v. Virginia Iron, Coal & Coke Co.[36] a call for S. 18°W. 220 poles failed to close a survey by 6000 feet and when run to an intersection gave an area of over three times the acreage called for. Taking the course as S. 81 W. the traverse closed, laid in the shape of the figure on the plat and included the correct acreage, 500. The court rightly held that there was a clerical mistake of inversion in the call for course.

[§ 193.] (4) **Effect of Established Error.**—The case of May v. Wolf Valley Coal Co.[37] involves the common boundary consisting of two lines between the Allen Moore patent of 1846 and the Nimrod McIntosh patent of 1824. A second patent of 1816 to McIntosh enters into the problem primarily because it confirms a call for a natural monument in the patent of 1824 and thus strengthens the establishment of one end of the disputed boundary as a certain group of trees. If the latitudes and departures of the latter traverse are calculated, a relatively small error of closure as compared with the discrepancy is found; but as calls for natural monuments take precedence over those for course and distance it is necessary to depart radically from the course of the fourth call to make the beech and white

[36]32 Ky. L. 601, 106 S. W. 815. [37]167 Ky. 525, 180 S. W. 781.

oak demanded as the corner between the fourth and fifth lines, recognized as correct and confirmed by the calls of the 1816 patent. The accepted position is shown in the sketch as at D in contrast to its location at 5 by courses and distances. This completely upsets the balance of the survey

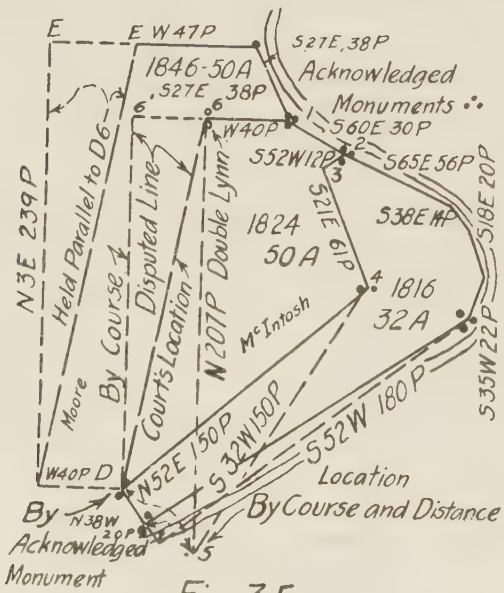

Fig. 35.

and necessitates departure from courses and distances of the remaining two lines, and the patent of 1824 makes no call for a natural monument at their intersection.

If the principle set forth in Combs v. Valentine[38] or in Brashears v. Joseph[39] is followed, courses are to be retained and the distances adjusted to the intersection at 6′. However the court preferred to follow the procedure established in Preston v. Bowmar[40] which, in short, prescribes if the discrepancy is caused by an error in the bear-

[38]144 Ky. 184, 137 S. W. 1080.
[39]32 Ky. L. 1139, 108 S. W. 307.
[40]2 Bibb. (5 Ky.) 493, 498, 6 Wheat. (19 U. S.) 580, 5 L. ed. 336, cited in May v. Wolf Valley Coal Co., 167 Ky. 525, 180 S. W. 781.

ing of a line, the bearing of a lost line shall be changed to compensate it. Therefore the course of the fifth call is changed and the survey closed by making it intersect the last line at 6, forty poles west from the point of beginning as called for in the patent.

The correctness of this adjustment is verified in the consideration of the calls of the 1846 patent to Allen Moore. The second line of this grant has the same eastern terminal as the last line of the McIntosh tract (three poplars), the same distance, and the reversed course; the third line of the Moore grant has the same distance call as the fifth line of the patent of 1824, the reversed course, and calls for it to run with the McIntosh survey. In addition there is a call for a double lynn at the western terminal of the second line of the Moore patent which is found on the ground, at the point 6, forty (40) poles from the point of beginning of the 1824 (McIntosh) patent, in harmony with the distance calls of both patents. This establishes the third line of the Moore patent and the fifth line of the McIntosh tract by natural monuments, one called for in each of the patents, in agreement with the theoretical location fixed by the court by abandoning the course of the fifth line rather than the distance of the sixth. The court in adjusting the balance of the Allen Moore tract to satisfy the change in its third line noted that the calls for the fifth line fixed it as approximately parallel to the third and retained this relationship by running it parallel to the newly established third line and disregarding the distance call of the last line so that the corner was established at "E." This verification is more convincing than the establishment by rule laid down in Preston v. Bowmar, for despite the quaint wording and apparent profoundness, it is an excellent example of the weakness inherent in a rule of construction, which in a compass survey has no mathematical foundation, and is not based upon experience.

[§ 194.] (D) Procedure to Adjust Survey Where Course and Distance Conflict.—(1) General.—Courses and distances are but mathematical descriptions of boundary lines which have direction as well as length, and in general one without the other is meaningless. A definite polygon can not be laid down by bearings alone; nor, unless it be a triangle, are distances by themselves sufficient to limit its shape and area. Therefore, as neither course nor distance can lay down a definite line, neither can be said to be more significant, more certain, or better expressing the intention.

Discrepancies of any nature may arise from true errors, that is, deviations from correctness due to imperfections of the human sight and touch, imperfections in the construction or adjustment of instruments, and to the conditions under which the observation is made; or from mistakes, that is blunders, which have their source in the human mind.[41] Course and distance are both observed quantities, and while it is true that course is less likely to error as defined above, both are equally subject to mistakes in the field and in transcribing the notes to the grant.[42] Errors may be studied, and under certain conditions may be adjusted by mathematics, but mistakes which have their source in the human mind are erratic and follow no law.

[§ 195.] (2) Irrational Adjustment Throwing All the Error into Distance.—Where it is held that courses must be preserved, it follows that distances must be sacrificed to make the survey close.[43] "If the courses and distances thus run do not close the survey, it must be accomplished by running the same course and either lengthening or shortening the distance, as each case may require and in proportion to the length of each line, as called for in the plat and

[41]See Tracy Plane Surveying, chap. II (John Wiley & Son Inc., 1906).

[42]See Combs v. Virginia Iron, Coal &c. Co., 32 Ky. L. 601, 106 S. W. 815 (§ 192, supra).

[43]Brashears v. Joseph, 32 Ky. L. 1139, 108 S. W. 307.

certificate of survey."[44] In keeping with this we find in Morgan v. Renfro[45] where three successive lines of a survey were lost, the distances of the three lines were to be altered proportionately to make them conform to the known parts of the survey rather than to radically alter the course of one of the lines. The courts have recognized that the simple procedure of throwing all the error into the distances is merely a rule of construction and has limitations and exceptions. In Combs v. Valentine[46] it was held that the general rule that courses shall be first pursued, contracting or extending the distances as the case may require, applied only in absence of any circumstance bringing the mind to a contrary conclusion. In Ramsey v. Morrow[47] the court ruled that a course should be changed rather than a distance, where it was manifest from the patent that such an adjustment laid down the grant with proximate certainty. The irrational method is a vain attempt to apply rigid mathematics to the eradication of blunders.

[§ 196.] (3) Rational Adjustment Changing Course or Distance as Circumstances Require.—(a) Control of Intention.—Any method of adjustment between conflicting courses and distances must aim to establish the grant on the ground in compliance with the intention as established by the deed, alone or together with sufficient convincing evidence. As courses and distances are merely descriptive they are weak aids in determining the intention, and therefore, in general, other calls must be looked to for this purpose. Quantity is admittedly a weak call,[48] but as its calculation involves both courses and distances, it is of great value as a test to determine whether a trial adjustment between conflicting courses and distances complies with the

[44]Beckley v. Bryan, Sneed (2 Ky.) 91.
[45]30 Ky. L. 533, 99 S. W. 311.
[46]144 Ky. 184, 137 S. W. 1080.
[47]133 Ky. 486, 118 S. W. 296.
[48]Brown v. Ray, 314 Ill. 570, 145 N. E. 676.

intention.[49] Where the area as computed from the trial courses and distances agrees with the call for quantity, the latter has high corroborative value.[50]

[§ 197.] **(b) Situation Survey the Foundation of Adjustment.**—The first step in the determination of control between course and distance is to lay down all boundary lines fixed by the superior calls of the deed or map, noting all discrepancies between the deed calls and the actual values found in the field. As the purpose of all rules of construction is to give control to the expressed intention of the deed, the courts are liberal in regard to the methods available to fix corners. It is recognized that the beginning corner of the survey is of no higher importance than any other, and the order in which the surveyor gives the lines and corners is of no consequence.[51] Therefore boundaries fixed by reversing courses and distances are as lawful and persuasive as by following the order of the survey[52] and must govern when found to coincide with natural monuments.[53] When all the recognized corners are established traverses may be run across the gaps for the purpose of preparing a situation plat establishing the relative positions of the open ends and determining the bearing and direction of the error of closure.

[§ 198.] **(c) Suggestions for Further Procedure.**—The situation plan merely pictures the problem upon paper so that it may be studied as a whole. Beyond the construction of such a map each problem becomes individual, and no general method of locating the blunder can be outlined.

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[49]Warren v. Boggs, 90 W. Va. 329, 111 S. E. 331.

[50]See Combs v. Virginia Iron, Coal &c. Co., 32 Ky. L. 601, 106 S. W. 815 (§ 192, supra).

[51]Beckley v. Bryan, Sneed (2 Ky.) 91. See also Davis v. Commonwealth Land &c. Co., 141 Fed. 711, 740, 760; Combs v. Valentine, 144 Ky. 184, 137 S. W. 1080.

[52]Thornberry v. Churchill, 4 T. B. Mon. (20 Ky.) 29, 16 Am. Dec. 125.

[53]Ellinwood v. Stancliff, 42 Fed. 316.

Suggestions made by the courts and gathered from experience are given below, but only a few of these are applicable to all situations.

(1) Study the calls of the adjacent grants and search back along the line of title.

(2) If any discrepancies are found in the bearing of length of a monumented line, consider the possibility of the lost line or lines being calculated as an omitted measurement and study the effect of the revealed error.

(3) The interior angles of a closed polygon when calculated from the bearings of the sides will, if the computation is correct, invariably satisfy the geometric condition that their sum shall equal the number of sides less two, times two right angles. This is true because an error or mistake in the bearing of one side will increase the angle at one end of that line by the same amount that the angle at the other end is decreased. Therefore the fact that the calculated angles between the lines of a boundary satisfy the mathematical requirements pertaining thereto, does not signify that the bearings are correct.

(4) Where there is conflict between course and distance
   (a) the method of making the survey;
   (b) whether surface or horizontal measurements were used;
   (c) the quantity of land conveyed;
   (d) the price paid therefore;
   (e) the facts and circumstances surrounding the parties at the time of the transaction may be weighed and considered in determining whether the distance of one line should control the course of another or vice versa.[54]

[54]Warren v. Boggs, 90 W. Va. 329, 111 S. E. 331.

(5) "Unprofessional men generally mean in stating courses the lines indicated by the compass, without making any allowance for the variation of the needle; and even professional surveyors, as appears from evidence, would not consider the true meridian as intended unless specially called for,"[55] but where United States Land laws or state statutes specify the true meridian such will be assumed.[56] Magnetic variations from the true meridian and its progress from the time of the original survey down to the making of the one in question will be noticed by the court[57] and where course and distance conflict, due allowance must be made for declination.[58]

(6) Where the directions are determined by the compass "A mistake in one course evidenced by applying the patent to the ground, can not be applied or be made by presumption to affect other courses named."[59] This principle is founded upon the fact that the observation for the magnetic bearings of lines are as independent of each other as are the measurement of their lengths. Where bearings are calculated from measured angles or observed in the field by a method in which the transit is oriented by sighting along a line of the survey (azimuth method) the above principle does not hold, and a mistake established affects all lines beyond by the magnitude of the error.

(7) Study the effects of possible inversion of figures, and the interchange of east for west and north for south, especially in lines near the cardinal points of the compass. Investigate the possibility of reading from the wrong end of the tape.

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[55]Jenny Lind Co. v. Bower, 11 Cal. 194.

[56]Wells v. Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575, 592.

[57]Lanfear v. Mestier, 18 La. Ann. 497, 89 Am. Dec. 693.

[58]Bryan v. Beckley, Litt. Sel. Cas. (16 Ky.) 91, 12 Am. Dec. 276.

[59]Bryan v. Beckley, Litt. Sel. Cas. (16 Ky.) 91, 12 Am. Dec. 276.

(8) Give due regard to the shape of the figure as it appears on the plat[60] and when possible make the adjusted traverse similar to that the deed attempts to lay down.[61]

(9) If possible confine the adjustment to one correction, for the probability of the occurrence of a single mistake is much greater than the simultaneous occurrence of two or more. The calculated length and bearing of the error of closure is a guide pointing to the possible location of the error. In Bryan v. Beckley[62] it was noted that a mistake in distance committed in the original survey on one line can affect the opposite line only. This wording is loose but undoubtedly means that an error in distance in a given line can only affect the length of a parallel line. This principle may be applied in locating a mistake, for if a line of a survey is approximately parallel to the error of closure, it is well to investigate that line. Thus in the accompanying figure the error closure is the line AM, and it is observed that CX is approximately parallel thereto. If, as in the case of Richardson v. Watts[63] this line presents difficulties in chaining, it is natural to presume that it is the source of the mistake, or, if the error of closure is twenty-two (22) feet and the line CX is given as three hundred thirty-nine (339) feet, it is likely that the tape was read from the wrong end and the length was three hundred sixty-one (361) feet making the point X at X′ and accounting for all the error. However, if the point X is monumented and recognized, or there is no line in the survey approximately parallel to the error of closure, it is well to

[60]Combs v. Virginia Iron, Coal &c. Co., 32 Ky. L. 601, 106 S. W. 815.

[61]Davis v. Commonwealth Land &c. Co., 141 Fed. 711, 740, 764, 767.

[62]Litt. Sel. Cas. (16 Ky.) 91, 12 Am. Dec. 276.

[63]94 Maine 476, 48 Atl. 180. See § 17, supra.

search for a line approximately at right angles to the discrepancy. The adjustment may sometimes be made by a slight change in the course of such a line, especial-

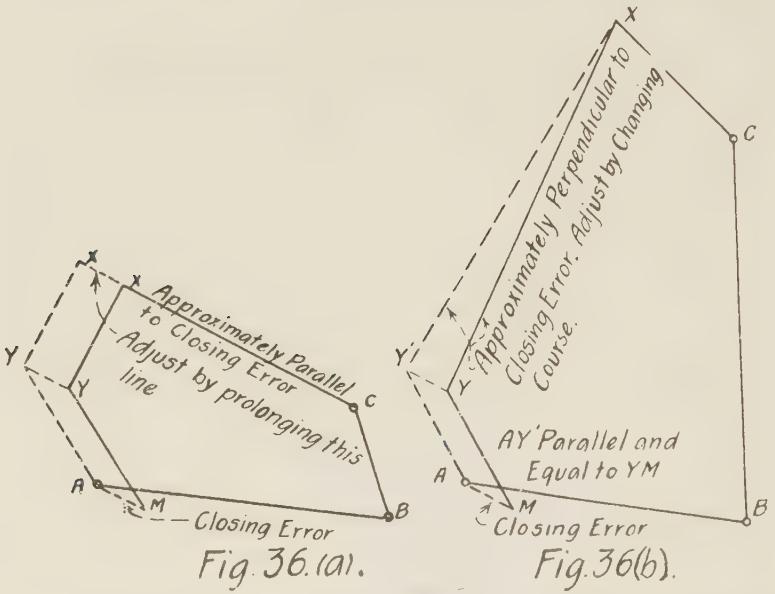

Fig. 36.(a). Fig. 36(b).

ly if it is long, without materially affecting the length, or necessitating radical changes in other lines. This adjustment is seldom as convincing as one involving the length of a parallel line.

It should be noted that the limitation of the adjustment to one correction does not imply that only one quantity may be changed. Thus if the point Y were in a swamp, the natural inference would be that the directions of all lines were observed and the lengths of AY and XY were calculated as omitted measurements. If there was convincing evidence of this, the adjustment of the two calculated lengths would be essentially one correction.

(10) Run the trial solution out on the ground and search for evidence supporting it as correct. Where the correction involves an error of transcription, the call for quantity is of great value, but where the correction is applied to a field measurement it is of less value; and if a line of the survey has been calculated as an omitted measurement, quantity may have no significance.

(11) It must be frankly admitted that in correcting a mistake in calls for course and distance the intention can not be usually ascertained from the deed, and the rule regarding the control of expressed intention must be qualified, and control must be given to that which most likely is in keeping with intention. In the comparison of two adjustments, tangible evidence is controlling; but consideration must also be given to the comparative reasonableness of the assumptions and theory upon which each is based. When the problem depends absolutely upon an adjustment between course and distance, the relative merits of the theories advanced for the solution determine the relative value of the respective results.

[§ 199.] **(E) Over Quantity. — (1) The Rule.**—"A definite description of lands in a deed designating the initial point and the courses and distances, followed by a statement of the number of acres conveyed, passes the quantity of land embraced in the specified boundaries, though greater or less than the number of acres stated."[64]

[§ 200.] **(2) Application.**—In Andrews v. Wheeler[65] this principle held under interesting circumstances. A map of two lots showed that one contained a specified number of acres without otherwise describing it, and the other was defined by distances. The court ruled that the latter took

[64] Pohlman v. Evangelical Lutheran Trinity Church, 60 Nebr. 364, 83 N. W. 201.

[65] 10 Cal. App. 614, 103 Pac. 144.

precedence in location in case of conflict in the absence of a showing of priority as to title, or field notes or monuments of the survey.

The rule does not apply when the quantity is expressly made controlling,[66] or where it is impossible to establish the boundaries without recourse to the call for quantity. The latter point was applied in Ducan v. Madara[67] where a tract supposed originally to contain four hundred forty-seven (447) acres really comprised more. Two hundred and fifty (250) acres had been sold off, and the conveyance for the remainder described the land by courses and distances which failed to close, and also as "one hundred ninety-seven acres, being the south end of a tract surveyed by virtue of a warrant in the name of Hugh Moore, being the remaining part of said tract hitherto unsold." It was impossible to make any reasonable adjustment to the courses and distances, and the court held that the proper way to make the survey was to include all within the south boundary of the 250-acre tract and the lines of the original tract south thereof.

X. CONTROL OF QUANTITY.

[§ 201.] (A) **General.**—A description of land by giving the number of acres is considered the weakest method of identification,[68] and the designation of quantity in the description of a deed will not control the boundaries where they are clearly indicated,[69] but when there is doubt as to the true description, such designation of quantity may be properly considered,[70] and while "quantity is a circumstance of slight, often no weight, in a question of title, it may have

[66]Rioux v. Cormier, 75 Wis. 566, 44 N. W. 654.

[67]106 Pa. 562.

[68]Bender v. Chew, 129 La. 849, 56 So. 1023.

[69]Kendrick v. Burchett, 28 Ky. L. 342, 89 S. W. 239; Wakefield v. Ross, 28 Fed. Cas. No. 17050, 5 Mason 16.

[70]Field v. Columbet, Fed. Cas. No. 4764, 4 Sawy. 523.

a marked effect where the question is one of boundary,"[71] and in some instances may have a controlling weight,[72] particularly if there is uncertainty in the specific description of the deed.[73]

[§ 202.] (B) **The Rule.**—In general quantity will control when—

(1) the superior calls are not set forth in the deed;[74]
(2) the superior calls leave the boundary doubtful;[75]
(3) quantity is made the essence of the contract[76] or there is an expressed or implied covenant to convey a definite quantity.[77]
(4) when quantity complies with the intention as established by the deed;[78]
(5) the courses and distances run the lines outside of the grantor's property and quantity limits the grant to his land.[79]

[§ 203.] (C) **Effect of the Words "More or Less."**—The interpretation of the words "more or less" is very important in determining the control accorded to quantity, especially where it is questionable whether or not it is the intention to make it the essence of the sale. "Far too much significance has been sometimes allowed to these and similar words. Their primary use is to show that all the land embraced within the description is intended to pass, and in that sense they are often important in the construction of the instrument. They may be decisive also upon a question

[71]Deppen v. Bogar, 7 Pa. Super. Ct. 434, 445, quoting Kennedy v. Lubold, 88 Pa. 246, 247. See § 206, infra.

[72]Wisconsin Realty Co. v. Lull, 177 Wis. 53, 187 N. W. 978.

[73]Montana Min. Co. v. St. Louis Min. &c. Co., 183 Fed. 51.

[74]O'Brien v. Clark, 104 Md. 30, 64 Atl. 53.

[75]Ainsa v. United States, 161 U. S. 208, 229, 40 L. ed. 673, 16 Sup. Ct. 544; People v. Call, 129 Misc. 862, 223 N. Y. S. 257.

[76]Sanders v. Godding, 45 Iowa 463.

[77]Doyle v. Mellen, 15 R. I. 523, 8 Atl. 709.

[78]Brown v. Ray, 314 Ill. 570, 145 N. E. 676, 680; Triplett v. Allen, 26 Gratt. (Va.) 721, 21 Am. Rep. 320.

[79]Watson v. New York, 67 App. Div. 573, 73 N. Y. S. 1027.

of how much consideration is to be paid, or of mere compensation when actual mistake does not appear. And where misrepresentation and mistake are claimed, they certainly qualify the statement of quantity which the instrument otherwise imports. They do not qualify it, however, by any means to the extent supposed. A deed which describes the land and states the number of acres, although with the words 'more or less,' clearly imports that there is not a great deficiency or excess. If the deficiency is one-half, the instrument carries on its face a gross misrepresentation. And it is quite material to observe that such words do not import a special engagement that the purchaser takes the risk of quantity. Their presence in a contract or deed may render it more difficult to prove such a mistake as will justify the interference of equity, but they are not equivalent to a stipulation that the mistake, when ascertained, shall not be a ground for relief. Even if that construction were to be placed upon them, it would still hold true that the contract, viewed in that light, may be entered into under misrepresentation and error so gross that it should not be allowed to stand."[80]

In Paine v. Upton[81] the above theory was cited and applied in sustaining the granting of relief where an error of approximately eight per cent. in the call for area was established. On the other hand Judge Johnson in writing the dissenting opinion in Belknap v. Sealey[82] says: "When the sale is in the bulk and quantity does not constitute the condition of the purchase, but only operates as an inducement, the presumption is that quantity is at the risk of the purchaser, and equity will not relieve in absence of fraud."

[§ 204.] **(D) Effect of Local Conditions.**—"In the purchase of a city lot the quantity of space can seldom be

[80]Belknap v. Sealey, 14 N. Y. 143, 158, 67 Am. Dec. 120 (Comstock, J.)

See § 56, supra.

[81]87 N. Y. 327, 41 Am. Rep. 371.

[82]14 N. Y. 143, 67 Am. Dec. 120.

accurately described by metes and bounds as may be done in the case of the purchase of a tract of farm land. The usual and only accurate and reliable mode of measurement of a city lot is by feet and inches, and this measurement is the proper description, and that by which the parties to the contract must have intended to be bound, for the difference of a few inches more or less in lines within which a city lot is bounded might cause a difference in pecuniary value exceeding that of acres of farm land."[83]

[§ 205.] (E) Applications.—(1) Where Superior Calls Are Not Set Forth.—If the calls of the deed are such as to make quantity an essential element in laying down the grant, it must of necessity prevail. Thus where the first, second, and last lines of a grant are fixed, and the third is described as beginning at a point on the second (which runs along the top of a bank) and running parallel with the first line so that the lot will contain ten acres—"containing ten acres and no more—"the proper survey is to follow the meanders of the top of the bank called for as the second course and to limit the grant to exactly ten acres by the position of the third course.[84]

The case of Jackson v. Sprague[85] is interesting in that while quantity was essential in laying down the grant and in establishing the boundaries, it yielded to a prior deed in conveying title. In 1797 Morris conveyed to Craig a tract of land described as "Beginning at the S. W. corner of a certain tract of land of 100,000 acres granted to Craigie, Watson, and Greenleaf, thence extending east along the southern boundary of said tract six miles; thence southerly so far as by lines to be drawn from these points parallel to the eastern and western boundaries of said 100,000 acre tract will include therein the quantity of 33,750 acres of

[83]Siebel v. Cohen, 54 N. Y. Super. Ct. 436, 437.
See § 74, supra.

[84]In re Rochester, 8 App. Div. 609, 40 N. Y. S. 1007.

[85]13 Fed. Cas. 7148, 1 Paine 494.

land." This tract was never surveyed, and it appears that five years prior, 1792, Morris had conveyed to other parties a certain tract which cut off two miles in width along the west side of the above tract (comprising 11,694 acres). The successor to Craigie in title maintained that the quantity was the very essence of the contract, and that the four-mile strip remaining should be extended southerly sufficient to make up the deficiency. The court held that where the quantity of a tract of land is given as well as the metes and bounds, the latter will control, although they contain less than the given quantity if they can be ascertained with certainty; that this applies whether the lands have been surveyed or not; and that the proper way to make the survey was to lay off 33,750 acres on a six-mile base and give to the successor of Craigie the 22,056 acres on the east. Quantity controls in this case because of the deficiency of superior calls, and while a description of an acre or other definite quantity of land in the corner of a particular tract will ordinarily be held to mean a square acre in such corner, if other parts of the description show that a particular parcel less in quantity and different in form was intended to be described, the call for quantity will yield.[86]

[§ 206.] (2) **Where Quantity Determines Which of Two Lines Is Intended.**—"If there be two lines, one corresponding with the quantity of land in the deed, and the other largely in excess, the inference would have weight in determining the true line, especially when strongly assisted by other evidence."[87] The holder of 12,600 square feet at a certain corner in Baltimore provided in his will as follows: "I give, devise and bequeath to—my real estate, corner of Baltimore and Carey streets in said Baltimore containing about 1500 square feet of land and buildings thereon." The property was held in part by fee simple and in part by lease

[86]Mayberry v. Beck, 71 Kans. 609, 81 Pac. 191.

[87]Kennedy v. Lubold, 88 Pa. 246, 247. See § 270, infra.

and was improved by seven buildings, some contiguous and some separated by yards. Four of these at the corner faced eighty feet and eight inches on Baltimore Street and having a depth of nineteen feet covered 1533 square feet. It was held that the bequest was limited to these four buildings as the area established these as intended and denied the outlying limits of the property as a possible boundary.[88]

In the case of Oakes v. De Lancey[89] a call for quantity determined the interpretation of the call "along said shore and sound." The preceding course called for its terminal not the shore but "a *point* on the shore" which the distance established as at low water, and likewise the distance of the following course fixed the other extremity of the boundary along Long Island Sound at low water. Therefore if the shore were to be regarded as a monument and the grant thereby limited to high water, two calls for distance would have to be violated and the area set forth in the grant would be materially reduced. However by regarding the terminals of the shore line as fixing the intention to convey to low water or the seaward side of the shore and using the same as a boundary, the call for area is harmonized, and conflict is removed. Therefore it is certain that the grant contemplated the low water line, regardless of the usual construction of the term "along the shore."[90]

This application operates to limit as well as to extend a grant. Thus where the distance calls of a deed fixed the terminals of a boundary "along said turnpike" at the side line of the same, the intention to limit the grant to the side line was confirmed by a call for quantity which was exactly satisfied by this line, but overrun by nearly five per cent. when the center line of the turnpike was taken.[91]

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[88]O'Brien v. Clark, 104 Md. 30, 64 Atl. 53.

[89]133 N. Y. 227, 30 N. E. 974.

[90]See also Riparian Boundaries.

[91]Kennedy v. Mineola, H. & Trac. Co., 77 App. Div. 484, 78 N. Y. S. 937. See § 270, infra.

[§ 207.] (3) **Where Quantity Is the Essence of the Contract.**—"That it is competent for parties so to contract as to suspend the application of recognized rules of construction to their deeds there can be no doubt. In all instruments parties may fix rules for the interpretation and the construction of their covenants though such rules be in conflict with those ordinarily recognized by law."[92] Where the parties to a transaction agree upon a price per unit of area and payment is made for a given area at the specified unit price, it is held that the call for quantity controls superior calls, unless there is clear evidence that the agreement was set aside and a sale in bulk consummated. In Wilson v. Randall[93] an agreement to purchase at $350.00 per acre, a contract to convey 54 15/100 acres at this price, a deed describing the land by metes and bounds and calling for 56 15/100 acres, and the payment of $19,652.50 (56.15x $350) considered together established the intention to sell at a unit price. The fact that final payment included the two acres called for in the deed but not in the contract was an important element indicating that the parties concluded the transaction with regard to the area, rather than by bulk. Under these circumstances the defendant was held liable for an actual shortage of 7 68/100 acres.

The case of Armour v. Sound Shore Front Imp. Co.[94] is even more striking. The pertinent facts begin with a contract of sale at $7,000 per acre, the area to be determined from a survey to be made by a certain named engineer. The high water line was erroneously established and an incorrect area of 17.02 acres reported. The deed gave the metes and bounds and specified this quantity and payment was made and accepted accordingly. Later, a shortage of 2.52 acres was revealed and suit was begun to recover the

[92]Sanders v. Godding, 45 Iowa 463.

[93]67 N. Y. 338.

[94]159 App. Div. 213, 144 N. Y. S. 340.

$17,677.00 paid for the same. In the defendant's argument it was suggested that the engineer acted as an arbitrator or referee and that in the absence of fraud his decision was binding. The court pointed out that the engineer had no judicial functions, that there was nothing to arbitrate, and that his sole duty was to ascertain the facts. These he found erroneously, and the parties relying upon them were mistaken. "As a rule. where a person by a mistake of fact, pays money to another which he does not owe him, the law implies a promise to repay it."[95] It was therefore held that the grantee was entitled to the return of the payment for the deficient area.

This theory is applied in a long line of cases where the purchaser seeks relief from fulfillment of contract and return of earnest money when the quantity set forth in the deed is less than that represented in the contract, and the vendor seeks to force the completion of the transaction.[96] But where the transaction has been completed and the deed accepted, it is by no means general, and when the problem is viewed as involving a breach of contract very different conclusions are reached.

"It is a general rule of evidence, as well settled as it is salutory, that a written contract executed between parties supersedes all their prior negotiations and agreements upon the same subject. This is especially true where the final contract is an executed one and those which preceded it were in their nature executory and looked for their consummation to the conveyance afterwards to be made."[97]

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[95]Gilbert J., in Graves v. Brinkerhoff, 4 Hun (N. Y.) 305. See also George v. Tallman, 5 Lans. (N. Y.) 392.

[96]Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; Raben v. Risnikoff, 95 App. Div. 68, 88 N. Y. S. 470; Floeting v. Horowitz, 120 App. Div. 492, 104 N. Y. S. 1037; Siebel v. Cohen, 54 N. Y. Super. Ct. 436; Von Bargen v. Ginsberg, 218 App. Div. 545, 218 N. Y. S. 601; Schulman v. Cornman, 221 App. Div. 170, 223 N. Y. S. 19.

[97]Gerhardt v. Sparkling, 49 Hun 1, 1 N. Y. S. 486, 488, cited in Lambert v. Krum, 121 Misc. 170, 200 N. Y. S. 452, 458.

"Contracts for the sale of land are in their nature executory, and generally the acceptance of a deed in pursuance of a contract is prima facie an execution thereof, and the rights and remedies of the parties are to be determined by the deed and the agreement therefore becomes void and of no further effect."[98] The practical effect of this theory is to debar the contract as evidence of an intention to sell at a unit price. In Gerhardt v. Sparkling[99] it was held that the prior contract no longer existed as grounds for action. In Stebbins v. Eddy[1] a contract for sale set the price at $50.00 per acre. No survey was made although such was originally intended, and deeds to the vendee and his subpurchaser described land by metes and bounds which included in their limits forty-seven and one-half (47½) acres. The defendant affirmed that according to his belief the farm contained over fifty (50) acres and maintained that the bargain was completed for $2500 on an estimated quantity of fifty (50) acres. The court held that the original agreement to sell by the acre had been rescinded and a sale in gross substituted.

The oft cited case of Faure v. Martin[2] is very similar. The contract called for the sale of a certain farm "containing 96 acres be the same more or less" at $60.00 per acre, payment to be made upon delivery of the deed. No survey was made, and it was held that the price per acre must have referred to the estimated acreage for this was the only quantity upon which to figure price, and therefore no rebate was allowed for the shortage. Judge Andrews in Wilson v. Randall[3] remarked: "The construction given to the contract * * * in Faure v. Martin is, at least, very strict in favor of the vendor, and we are not fully

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[98]Bull v. Willard, 9 Barb. 641, cited in Gerhardt v. Sparkling, 49 Hun 1, 1 N. Y. S. 486, 487; Lambert v. Krum, 121 Misc. 170, 200 N. Y. S. 452, 458.

[99]49 Hun 1, 1 N. Y. S. 486.

[1]Fed. Cas. No. 13342, 4 Mason 414.

[2]7 N. Y. 210, 57 Am. Dec. 515.

[3]67 N. Y. 338.

satisfied that it was the true interpretation of the agreement."

[§ 208.] (4) **Effect of Survey.**—It will be observed that in the cases where quantity was held to be the essence of the transaction the deed description was based upon a survey, and that in those where the sale was regarded as in the bulk, none was made. This is an important element in determining whether the quantity is to be controlling, for the absence of a survey surely suggests that the original contract is abandoned and a sale in the gross made in its place, and while the deed supersedes the contract, a survey is strong evidence indicative of the purpose to conclude the transaction on a unit price basis.

[§ 209.] (5) **Where Quantity Establishes the Intention.**—In June 1901 Mrs. Dutcher conveyed to Creech who owned the south forty-three and one-third (43 1/3) feet of Lots One and Two in a certain addition a parcel of land described as follows: "Commencing at the northeast corner of lot one (1) block six (6) thence southerly along the easterly line of said lot one (1) eighty (80) feet to the point of beginning; thence westerly parallel with Fifth Street one hundred (100) feet to west line of lot two (2) in a said block six (6) thence southerly along westerly line of said lot two (2) six and two-thirds (6 2/3) feet thence easterly parallel with said Fifth Street one hundred (100) feet to easterly line of said lot one (1) thence northerly along easterly line of said lot one (1) six and two-thirds (6 2/3) feet to point of beginning." In May 1905 she deeded to Turner the northerly eighty feet of Lots One and Two. Shortly after, the city engineer maintained that Turner encroached on the street one and eight-tenths (1.8) feet, and the latter sought to retain his depth of eighty (80) feet by crowding the Creech line south. He argued that the call for the point of beginning of the Creech deed as

eighty (80) feet south from the northeast corner of Lot One, established an intention on Mrs. Dutcher's part to retain a depth of eighty (80) feet. The court held that reference to the whole description showed that the primary intent of the grantee was to buy, and of the grantor to sell six and two-thirds (6 2/3) feet, and the fact that the true location of the northeast corner of lot one was one and eight-tenths (1.8) feet south of the point fixed by the surveyor would not be allowed to overcome the acts of the parties.[4]

XI. RELATIVE IMPORTANCE OF CONFLICTING GRANTS.

[§ 210.] **(A) The Rule.**—Where there is a dispute of boundaries in two conveyances from the same grantor, the calls of the senior grant must control, and no language contained in the junior grant can in case of conflict extend or change the lines of the elder grant,[5] and it has been ruled that where the first sale by the grantee calls for a specified area, the quantity so set forth must be satisfied by preference and priority over all junior grants.[6]

[§ 211.] **(B) Exceptions.**—However a grant of land identified by specific boundaries or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises than a floating grant, although such grant to be first surveyed and patented.[7] The rule is subject to limitations arising from the control of other established principles recognized by the courts as superior evidence of the intention. Thus where the senior grant read "Bounded northerly by a contemplat-

[4]Turner v. Creech, 58 Wash. 439, 108 Pac. 1084.

[5]Bryant v. Terry, 189 Ky. 489, 225 S. W. 242.

[6]State v. Stutzner, 153 La. 233, 95 So. 701.

[7]Henshaw v. Bissell, 18 Wall. (85 U. S.) 255, 21 L. ed. 835, cited in Hale v. Akers, 69 Cal. 160, 10 Pac. 385. See also Kerr v. De Laney, 28 Ky. L. 1140, 91 S. W. 286.

ed street called 'Snell Street' " easterly by land of grantor, southerly by land of Israel Buffington, and westerly by land of the said Augustus Chace, the grantor, and contains forty-one and 53/100 rods of land more or less," fences built on the line of the original stakes set out to give the practical location of the grant prevailed over the definite and certain calls of a junior grant, although the land included within the fences gave the senior grant forty-two and one-half (42½) rods of land, and the calls of the senior grant a slight fraction over forty-one and 53/100.[8] Where the grants are made by a common grantor separately but simultaneously, that which is first surveyed and given practical location will prevail.[9]

[§ 212.] XII. Relative Importance of Conflicting Surveys.—If the lines of an older survey can be established by its lines and corners, and the lines and corners conflict with an adjoining survey, the lines of the adjoining survey must give way to the lines of the older survey.[10] Thus where the field notes of a survey were filed and recorded prior to a subsequent survey, they were not contingent on any future work, and appropriated definite lands, the lines of which could not be affected or changed by subsequent surveys.[11] This rule is general[12] and applies with great force where the lines of the prior survey are established and recognized, and are called for in the description of the junior grant.[13] Where the surveyed line of the older survey is well marked, established and recognized, and a call for it as a bound is made in a junior grant, such line as established, marked and recognized at the time of the junior survey will prevail over the true line of the senior

[8]Hooten v. Comerford, 152 Mass. 591, 26 N. E. 407, 23 Am. St. 861.

[9]Adams v. Wilson, 137 Ala. 632, 34 So. 831, quoting 5 Cyc. 973.

[10]Ulman v. Clark, 100 Fed. 180.

[11]Brooks v. Slaughter (Tex. Civ. App.), 232 S. W. 856.

[12]Snodgrass v. Snodgrass, 212 Ala. 74, 101 So. 837.

[13]Shackelford v. Walker, 156 Ky. 173, 160 S. W. 807.

survey in its correct position, and distance calls of the junior grant will not be extended to conform with the correct but unmarked and unrecognized line of the senior survey.[14]

Where surveys are made the same day, and one describes a certain side as bounded by vacant land, and the second describes its corresponding side as bounded by land of the first survey, the inference is that the first is prior and takes seniority over the second.[15] An office survey prevails over a subsequent survey actually made because the prior location, although only on paper, appropriates the land. But where the office survey makes a call for a well marked and established line recognized as a landmark by the junior survey which is actually made, and in the notes of both there are calls for recognized landmarks, giving minute and accurate details which could only be ascertained from a survey, control is given to the junior survey.[16]

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[14]Morgan v. Mowles (Tex. Civ. App.), 61 S. W. 155.
See § 102, supra.

[15]Collins v. Clough, 222 Pa. 472, 71 Atl. 1077.

[16]Shindler v. Lutcher &c. Lbr. Co. (Tex. Civ. App.), 107 S. W. 941.

CHAPTER III

EXCESS AND DEFICIENCY.

I. THE RULE.

Section.
215. The Rule.

II. REASONS FOR THE RULE.

216. Reasons for the Rule.

III. CONDITIONS FOR THE RULE TO APPLY.

217. Conditions for Rule to Apply.

IV. LIMITATIONS.

218. Limitations.

V. EFFECT OF STREETS.

219. Effect of Streets.

VI. EFFECT OF IMPROVEMENTS.

220. Effect of Improvements.

VII. EFFECT OF IRREGULARITY IN PLAN.

221. General.
222. Lot Not Dimensioned.
223. Lots Dimensioned but Irregular.

VIII. EFFECT OF LOCATION OF DISCREPANCY BEING ESTABLISHED.

224. Effect of Location of Discrepancy Being Established.

IX. EFFECT OF REFERENCE TO A PLAT IN DESCRIPTION BY METES AND BOUNDS.

225. Effect of Reference to a Plat in Description by Metes and Bounds.

X. RULE TO BE APPLIED AS LAST RESORT.

226. Rule to be Applied as Last Resort.

I. THE RULE.

[§ 215.] Where a tract of land is subdivided and platted, any excess or deficiency is to be apportioned among the several parcels, for it can not be presumed that the variance arose from the defective survey of any part, but

it must be concluded in the absence of evidence that it arose from imperfect measurement of the whole line;[1] and the excess or deficiency, determined by actual measurement between recognized monuments as compared with the plat dimensions, in the absence of any marking on the ground of the division lines between the lots, must be apportioned between the subdivisions of the whole line in proportion to their respective lengths,[2] and if there is an excess the title thereto does not remain in the original owner of the tract.[3]

II. REASONS FOR THE RULE.

[§ 216.] Where the excess or deficiency is due to the original chain or tape being too long or too short, rigid mathematics dictates that the error be distributed proportionally among the subdivisions of the line, and where a small discrepancy is due to careless surveying, and there are no circumstances suggesting that there is a gross blunder in any part of the survey, the law of probability supports the rule. But where it can be proved that the error is caused by an erroneous assumption in regard to one terminal of the line or side of an area, then the rule has no rational basis, for an error which is located and explained should not, from a mathematical standpoint, be distributed.

However, certain circumstances may justify an apportionment of the excess or deficiency, even where the conditions do not substantiate the mathematical basis for the rule. Thus where a line is supposedly of a certain length, but is in reality a small fraction of the frontage of a lot in

[1]Westcott v. Craig, 60 Colo. 42, 151 Pac. 934.

[2]Andrews v. Wheeler, 10 Cal. App. 614, 103 Pac. 144; Stahlman v. Riordan (Tex. Civ. App.), 227 S. W. 726; Stanley v. County Surveyor, 126 Kans. 95, 266 Pac. 929.

[3]Booth v. Clark, 59 Wash. 229, 109 Pac. 805, 1912A, Ann. Cas. 1272; Coppin v. Manson, 144 Ky. 634, 139 S. W. 860.

excess of this supposed length, and a plat shows it divided into a given number of equal parts, the logical conclusion is that the platter intended to set down a given number of lots of equal frontage and had he known the correct length of the line he would merely have made each lot of a trifle larger frontage. When the rule is applied in such a case, it prevents the platter's intention from being overcome by an error or blunder that he did not recognize. The plat as a pictorial representation shows clearly the number of lots into which the area was to be divided, and its dimensions indicate the relative sizes which can only be maintained by apportioning the excess or deficiency.[4] Furthermore, where an excess or deficiency exists and is not distributed, a lot may have two positions, according to the starting point of the survey. Therefore it is essential that the discrepancy be apportioned to stabilize its location.

Where there exists tangible evidence of the original lines, or where there is an indication that the platter was aware of a possible excess or deficiency, and by the omission of a dimension signified an intention of placing it in a particular lot, then the rule has no basis and does not apply.[5]

III. CONDITIONS FOR RULE TO APPLY.

[§ 217.] The rule of apportionment of excess or deficiency applies—

(1) Where the tract is divided into lots by a plan, and conveyance is made solely by lot number with reference to the plat.[6]
(2) Where the tract is divided in proceedings in partition.[7]
(3) Where the tract is divided into two or more parts of designated area.[8]

[4]Quinnin v. Reimers, 46 Mich. 605, 10 N. W. 35.
[5]See § 222, infra.
[6]Coppin v. Manson, 144 Ky. 634, 139 S. W. 860; Coop v. George A. Lowe Co. (Utah), 263 Pac. 485.
[7]Clayton v. Feig, 179 Ill. 534, 54 N. E. 149.
[8]Bennett v. Simon, 152 Ind. 490, 53 N. E. 649.

(4) Where the whole tract is intended to be conveyed by two or more deeds executed at the same time, and no lines are laid down on the ground, but it is the intention that the tracts shall adjoin.[9]

(5) Where the tract consists of a number of surveys lying between lines fixed by the adjoining tracts.[10]

(6) Where the tract consists of two or more surveys made into one inclusive survey or made at or about the same time by the same surveyor.[11]

(7) Where the lots conveyed are intended to adjoin, but it appears when laid down as described in the conveyances there is a space between them.[12]

IV. LIMITATIONS.

[§ 218.] While certain circumstances raise a presumption that an excess or deficiency is to be apportioned, the facts in any particular case may establish that the intention is otherwise, the presumption is overcome, and the rule does not apply—

(1) Where the plat referred to shows all lots but one dimensioned,[13] for it is the clear intent of the grantor that this lot be regarded as a remnant to take the excess or deficiency,[14] and the omission precluding the interpretation of the plat as a whole, gives the dimensions of the plat control.

(2) Where a street or other recognized and acknowledged monument shown on the plat and found on the ground limits the distribution of the excess or deficiency,[15]

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[9]Marsh v. Stephenson, 7 Ohio St. 264, 70 Am. Dec. 72.

[10]Austin v. Espuela Land &c. Co. (Tex. Civ. App.), 107 S. W. 1138.

[11]Johnson v. Knippa (Tex. Civ. App.), 127 S. W. 905.

[12]Lincoln v. Edgecomb, 28 Maine 275.

[13]Toudouze v. Keller (Tex. Civ. App.), 118 S. W. 185.

[14]Pereles v. Gross, 126 Wis. 122, 105 N. W. 217, 110 Am. St. 901.

[15]Williams v. St. Louis, 120 Mo. 403, 25 S. W. 561.

for the best evidence of the location of a line is the very stakes or monuments set by the surveyor.[16]

(3) Where the land is platted into blocks with intervening streets, each block should if possible be treated as distinct, and the shortage or excess therein be distributed among the lot owners, except so far as possession has fixed limits.[17]

(4) Where improvements have been made on the original lines,[18] for where the grantee has been put into possession to certain definite lines whose identity and position can be unquestionably established, the superior rule in regard to lines marked and surveyed prevails.[19]

(5) Where the footsteps of the surveyor in laying down the plat can be definitely followed, and the location of the excess or deficiency established,[20] for where the lines as originally run can be fully retraced, the excess and deficiency is not to be apportioned.[21]

(6) Where there is no connection between the deeds of the various grantees in both time and circumstances,[22] for where each grant is distinct and separate they take precedence in order of seniority, and the junior grant must bear the deficiency or take the excess.

(7) Where the tracts of land are conveyed separately and simultaneously by a common grantor, but one is based on a prior survey,[23] for this is in effect a senior grant.

(8) Where an attempt to apportion the excess or deficiency would cut the land into such sized lots as to cause the boundary lines to pass through houses and improve-

[16]Pereles v. Gross, 126 Wis. 122, 105 N. W. 217, 110 Am. St. 901.

[17]Anderson v. Wirth, 131 Mich. 183, 91 N. W. 157.

[18]Maysville v. Truex, 235 Mo. 619, 139 S. W. 390.

[19]See Lines Marked and Surveyed, §§ 77-83, supra.

[20]Schuster v. Myers, 148 Mo. 422, 50 S. W. 103.

[21]Westcott v. Craig, 60 Colo. 42, 151 Pac. 934. See § 215, supra.

[22]Hruby v. Lonseth, 63 Wash. 589, 116 Pac. 26; Bloch v. Pfaff, 101 Mass. 535.

[23]Adams v. Wilson, 137 Ala. 632, 34 So. 831.

ments, for when actual possession has fixed limits the general rule may be rendered impossible.[24]

V. EFFECT OF STREETS.

[§ 219.] Streets that have been opened in supposed conformity to a plat and have been long acquiesced in should be accepted as fixed monuments in locating lots or blocks contiguous thereto or fronting thereon.[25] In a Missouri case[26] a distance of supposedly eleven hundred seventeen (1117) feet had been platted in 1853 into two blocks of five hundred and six (506) feet each with a sixty (60) foot street known as Cheltenham Avenue between them and an alley along the southern side of the original tract. In 1894 action was brought against the city by a certain property owner to the south of the avenue to move the entire street twenty (20) feet to the north so that he might share one-half of an established surplus of forty (40) feet which lay entirely in the block to the north. It is interesting to note that he did offer to pro rate this excess and place a portion in the street. The court rightly held that this was a case where the surplus could not be distributed pro rata, because Cheltenham Avenue was laid out and made the boundary on the north of the plaintiff's lots, and that as the street was monumented by stones exactly five hundred and six (506) feet from the alley, and fences had been erected in conformity with the line so established, it controlled as a monument, and would control regardless of an excess or deficiency in the block.

Streets limit the apportionment of excess and deficiency because it is essential that their location be undisturbed, but where they themselves are not fixed, the reason for

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[24]Hillside Cotton Mills v. Bartley, 156 Ga. 271, 119 S. E. 404.

[25]Pere Marquette R. Co. v. Graham, 150 Mich. 219, 114 N. W. 58.

[26]Williams v. St. Louis, 120 Mo. 403, 25 S. W. 561.

their control ceases, and cases may arise where apportionment should be extended over more than one block. In Coop v. George A. Lowe Co.[27] a plat showed Block Twenty-four

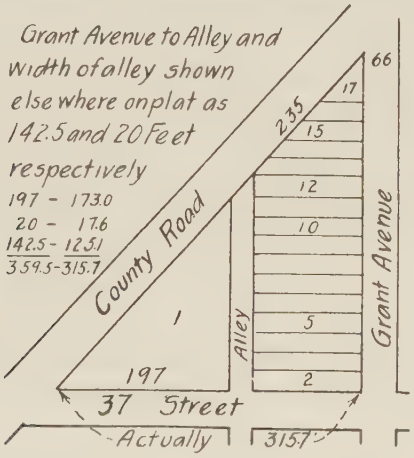

Fig. 37.

consisting of seventeen lots, one triangular in shape fronting one hundred ninety-seven (197) feet on 37th Street and the other sixteen lots fronting on Grant Avenue and separated from Lot One by a twenty-foot alley. The lots on Grant Avenue were not dimensioned, but in Block Forty-three to the south the alley was shown as one hundred forty-two and one-half (142.5) feet west of Grant Avenue and parallel thereto. This made the plat distance from the southwest corner of Lot One to the southeast corner of Lot Two, 197+20+142.5=359.5 feet, whereas on the ground there was but 315.7 feet. The county road to the west was intended to be four rods wide but was actually eight. However as the plat was laid from the line of the eight-rod road, this was of no consequence. The alley had long been in dispute. The abutting property owners did not recognize an existing fence as fixing its lines, and it had not be-

[27] (Utah), 263 Pac. 485.

come established by adverse possession. Under these circumstances the court prorated the deficiency, giving one hundred seventy-three (173) feet to Lot One, seventeen and six-tenths (17.6) feet to the alley, and one hundred twenty-five and one-tenth (125.1) feet to the lots between the alley and Grant Avenue. There is nothing in the record to show that the line of the alley in blocks to the south was fixed, and therefore this apportionment was essentially correct. Had fences or other structures in adjoining blocks located the alley, then its position in Block Twenty-four would have been determined as in line with the alley as fixed by improvements, and the apportionment would not apply.[28]

It is questionable whether the shortage should be prorated in a street. Street widths are usually first determined before the actual platting is begun, and several widths accepted as representing the requirements for the various classes of streets. The general tendency is to keep the street area down to a minimum, and it is usually a reasonable presumption to assume that the platter gave careful thought to his street dimensions and intended them as shown. Had he known of a deficiency he would have taken a little off the lots on either side or rearranged his street plan to give a more satisfactory layout. The court wrongly said that the public or private character of the alley was not involved "except as it may have some bearing upon the plaintiff's claim of adverse possession." When the width of a street is changed, the public is very much interested, and a court which protects public rights in a way from private encroachments should not, in the apportionment of a deficiency, assign any land within the stated width of a street to the abutting lot owners, especially where the public's representatives are not participants in the action. An ap-

[28]See Streets, § 258, infra.

portionment in better keeping with the platter's intention, the public's interest, and possibly the convenience of the lot owners would have placed one hundred seventy-one and six-tenths (171.6) feet in Lot One on 37th Street, twenty (20) feet in the alley and one hundred twenty-four and one-tenth (124.1) feet between the alley and Grant Avenue. Along narrow alleys or streets a foot in the street may be worth two in the lot.

VI. EFFECT OF IMPROVEMENTS.

[§ 220.] "In resurveying a tract of land according to a former plat or survey, the surveyor's only function or right is to relocate, upon the best evidence obtainable, the corners and lines at the same places where originally located by the first surveyor on the ground."[29] Therefore where it is established that existing improvements were erected soon after the plat had been laid down and in conformity with the original lines and stakes, these structures preclude the apportionment of a shortage or surplus, for these are controlling evidence of the platter's intention.[30] But "practical location or use and occupation, in order to be evidentiary of original locations, must be at least open to the inference that it commenced with some reference to the original survey lines or markings,"[31] and the significance of structures depends upon whether they were built according to lot lines and upon the probability that their builders at the time of construction had better means of knowing than are now available where the original lines of the plat were.[32] This point is well illustrated in Anderson v. Wirth[33] where the eastern wall of a certain warehouse was built supposedly along the western line of a railway right of

[29]Dodge, J., in Pereles v. Gross, 126 Wis. 122, 105 N. W. 217.

[30]See § 77, supra.

[31]Dodge, J., in Pereles v. Gross, 126 Wis. 122, 105 N. W. 217.

[32]Pereles v. Gross, 126 Wis. 122, 105 N. W. 217.

[33]131 Mich. 183, 91 N. W. 157; 134 Mich. 612, 96 N. W. 926.

way as shown on a plat. If the position of this wall was correct, there existed in the block an excess of three feet two inches to be apportioned among the lots "except so far as possession had fixed the limits." The evidence established that shortly after the subdivision had been laid down, the tracks had been shifted some three to four feet east and that the warehouse, built subsequent to this shift, had been located one half of the right of way width from the center line of the tracks in their new position. Therefore instead of being on the western line of the railroad property the warehouse wall was over three feet to the east thereof, and its position did not establish an excess in the block, for the east line of the latter was clearly within the building, which evidence established was not built in conformity with the plat.

If one takes possession of land and holds it by mistake, with no intention of taking what does not belong to him, that would not destroy the adverse character of his possession, if it was his intention to hold all that was possessed, believing it to be his,[34] and therefore the question of color of title does not apply in boundary disputes.[35] Hence where improvements have stood for over twenty-one years, title to the land covered by them is determined by adverse possession, and the excess or deficiency in the block can not disturb the lines of possession so fixed. But if adverse possession is claimed by occupation during a shorter statutory period, and the statute requires color of title, then the absence of such is fatal, and the shortage or surplus is to be apportioned.[36] Furthermore, where the conveyance is by lot and block number, and there is a deficiency in a block,

[34]Chostner v. Shrock (Mo.), 252 S. W. 381.
See also Adverse Possession, §§ 336-340, infra.

[35]Gloyd v. Franck, 248 Mo. 468, 154 S. W. 744.
See §§ 344, 345, 346, infra

[36]Nilson Bros. v. Kahn, 314 Ill. 275, 145 N. E. 340.
See §§ 344, 345, 346, infra.

color of title is not given to the frontage of the particular lot as shown on the plat, but only to such frontage as is fixed by prorating the deficiency.[37]

This distinction is well developed by contrasting the details of Gloyd v. Franck[38] and Nilson Bros. v. Kahn.[39] In the former there was a surplus of 4.57 feet in a block platted as three hundred eighty-three and one-half (383.5) feet and divided into seven lots of forty-eight (48) feet eacn and one at the north end of forty-seven and one-half (47.5) feet. The plaintiff owned the third and the defend-

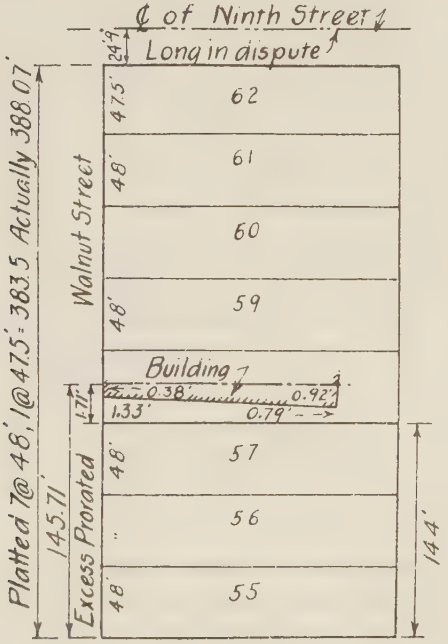

Fig. 38.

ant the fourth from the south end of the block. The improvements on the defendant's lot were erected in accord with a survey of 1883 which placed his south line one hun-

[37]Nilson Bros. v. Kahn, 314 Ill. 275, 145 N. E. 340.

[38]248 Mo. 468, 154 S. W. 744.

[39]314 Ill. 275, 145 N. E. 340.

dred forty-four (144) feet from the north line of 10th Street to the south, and consisted primarily of a building forty-six (46) feet by one hundred (100) feet whose southwest and southeast corners were respectively 1.33 feet and 0.79 feet north of the south boundary line of the lot. To the rear was a yard approximately forty-eight (48) by fifteen and one-half (15½) feet not marked by any definite limits. Other improvements in the block were in conformity with the lot lines as determined by prorating the excess. The apportionment placed the boundary between the parties to the action parallel to and 145.71 feet north of the north line of 10th Street. This entered the defendant's building at the front or west end 0.38 feet from the south side and came out at the rear 0.92 feet from the southeast corner. The court held that the plaintiff was entitled to a peremptory instruction that the line between his and the defendant's lot as 38/100 and 92/100 feet within the building at the west and east ends respectively, and everywhere 145.71 feet from the north line of 10th Street; and that as the building had stood for over twenty-five years the defendant was entitled to a peremptory instruction as regards the land covered by the building, and that he had acquired the same by adverse possession, but that the strip to the rear, south of the 145.71-foot line upon which there were no improvements had not been so acquired.

The details of Nilson Bros., Inc. v. Kahn are very similar. The former acquired title to the north one-half of Lot Five and south one-half of Lot Six as represented upon a plat dated 1868 which showed eleven fifty-foot lots and one forty-nine-foot lot on Halstead Street to the north of Belmont Avenue (sixty-six feet wide). There was no description by metes and bounds. Nilson Bros. erected a building, fifty (50) feet wide, with its north wall three hundred and eight (308) feet from the center line of Belmont Avenue making no allowance for the shortage of 2.68 feet which,

if apportioned made his north line 306.77 feet north of the center line of Belmont Avenue and his building 1.23 feet over his line. Kahn in improving his property to the north

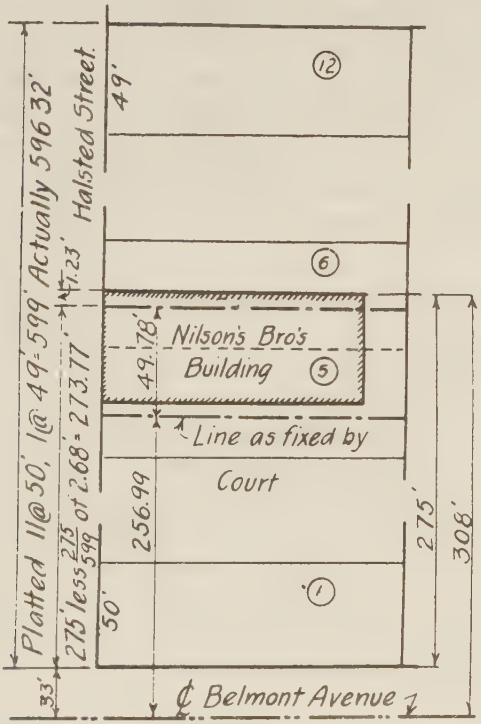

Fig. 39.

rested his beams in Nilson Brothers' wall, who brought suit to restrain him, claiming that, as their building had stood for twelve years they had acquired the land upon which it stood by adverse possession. In this they relied upon a statute which fixed the necessary period of possession, where one claimed under color of title, as ten years. But as set forth above, their deed, necessitating reference to the plat for its practical location, confined their title and their claims to lines 256.99 and 306.77 feet from the center

line of Belmont Avenue, and therefore the statute was of no avail as support. It is a general rule that improvements of a permanent character made on real estate and attached thereto without the consent of the owner of the fee, by one having no title or interest, become a part of the realty, and vest in the owner of the fee,[40] and therefore Kahn had the right to project his beams approximately fourteen inches into the wall, and Nilson Brothers' improvements did not restrain the apportionment of the deficiency amounting to approximately 0.22 feet per lot.

VII. EFFECT OF IRREGULARITY IN PLAN.

[§ 221.] **(A) General.**—It is hard to apply the rule giving the intention as effectively expressed in a plat control where conflict exists, for the evident reason that the subdividor in most cases anticipated no excess or deficiency, and therefore had no clear intention regarding its apportionment. Where the exterior lines of a subdivision are in doubt, and practical reasons preclude a settlement, the platter may be aware of a future location and provide for its adjustment by fully dimensioning all the lots but one, usually adjacent to the doubtful line, leaving that undimensioned or qualified more or less.

In subdividing effort is often made to maintain regularity in lot and block dimensions, but seldom is it possible to avoid all irregularities, and the courts have not been consistent in interpreting the platter's intention where all lots are definitely dimensioned, but some irregular in size.

[§ 222.] **(B) Lot Not Dimensioned.**—In order to apportion a discrepancy among the several lots of a block it is necessary to know the frontage of each lot, and where

[40] Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476, 479, 21 L. R. A. 489, 36 Am. St. 486.

all lots but one are fully dimensioned it is impossible from a mathematical standpoint to apply the rule. It can not be scaled from the plat because of the impossibility of platting to a small scale as accurately as field measurements and office calculations can be made. Furthermore when the impracticability of scaling an undimensioned detail of a plat is acknowledged, there no longer exists a surplus or deficiency, for the survey must be made in compliance with the dimensions of the plat, and the undimensioned lot, of necessity, must take what is unassigned, be it more or less than the scaled dimension.[41]

While distances are held in low regard by the courts, they can not be ignored, and their significance be unheeded. Where a platter has definitely given a dimension to all the lots but one and has omitted that entirely or has qualified it as more or less, he has effectively expressed his intention to regard that as a remnant, and this overcomes the necessity of attempting an apportionment. The case of Pereles v. Gross[42] is a most interesting example of improper surveying methods. There existed a surplus between tne points A and E of 33.83 or 37.83 feet depending upon whether Johnson Avenue was sixty-two (62) or sixty-six (66) feet wide. All lots but number 46 were fully dimensioned, and the proper procedure was first to determine the width of Johnson Avenue and then to lay the plat off from E towards A placing the entire surplus in lot forty-six (46) as shown in Figure 40b. The city engineer, however, attempted to correct certain bad features of the street plan at the same time and arrived at the location shown in Figure 40a. To accomplish this end he changed the widths of the streets so that they were in line with the sixty-six (66) foot streets in back of the blocks involved. This created a deficiency in most blocks and in one an ex-

[41] Pereles v. Magoon, 78 Wis. 27, 46 N. W. 1047, 23 Am. St. 389.

[42] 126 Wis. 122, 105 N. W. 217, 110 Am. St. 901.

cess greater than the original surplus. These newly-established excesses and deficiencies he apportioned among the lots of the blocks according to their frontage, increasing the frontage of three fifty-foot lots fifteen and one-half (15½) feet, approximately thirty (30) per cent., and decreasing

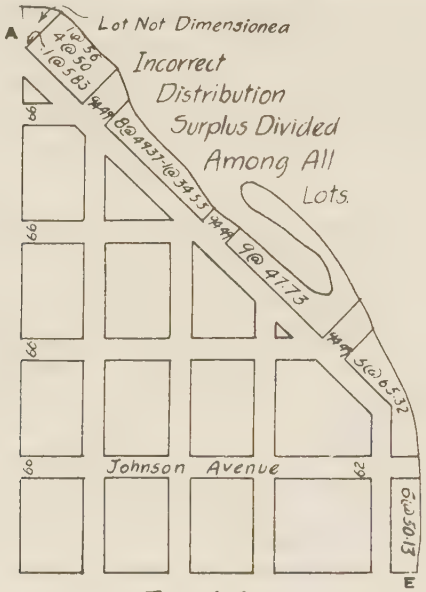

Fig. 40.(a).

the frontage of twenty-two lots by slight amounts. Establishing the street adjacent to the block with the undimensioned lot in line with the upland street, he left the dimensioned lots as they were and threw the balance, 5.83 feet, into the undimensioned lot. The court censured the engineer in regard to this dimension on the ground that it was determined by scaling a plat on a two hundred scale. If this was so, the court was right, for it would have involved making a measurement to 1/20,000 of an inch, but there is nothing in the record to clearly establish that this was not obtained in the field. It is true that the city

engineer laid down a much superior street plan in apparent conformity with the attempted picture of the tract by means of a small plat, but such has little significance against stated angles, courses and distances which the original surveyor declared to have controlled his survey,[43] and as

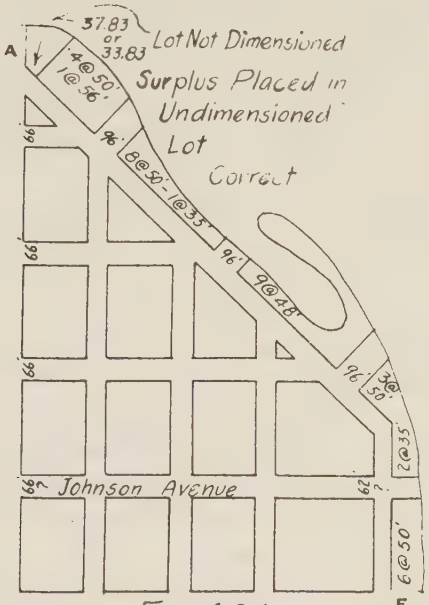

Fig. 40.(b).

the object of all surveying is to locate lines in their original positions, the presence of a discrepancy affords no authority for improving the plan.

[§ 223.] (C) **Lots Dimensioned but Irregular.**—Where all the lots of a plan are definitely dimensioned, but one is irregular in shape or proportions, there is some authority for placing an existing surplus or deficiency in the irregular lot.[44] The theory underlying this rule is developed in Bar-

[43]Pereles v. Gross, 126 Wis. 122, 105 N. W. 217. 110 Am. St. 901.

[44]Baldwin v. Shannon, 43 N. J. L. 596.

rett v. Perkins,[45] where the controversy narrowed down to the question whether Lot Twenty-two was or was not erroneously designated on the plat as a seventy-five-foot lot. The deficiency was revealed when a survey to locate the line between Lots Eighteen and Nineteen starting from the southwest corner of Lot Twenty-two and using the plat dimensions was found to be in conflict with the improvements on other lots and to crowd Lot One off the plat. The lower court had sustained this survey; but when the case was appealed the higher court maintained that it was clearly in error on the ground that proper regard had not been given to the deficiency. It also recognized that the rule requiring an apportionment of an excess or deficiency is well settled,[46] but held that it did not apply under the particular circumstances. According to the report there was evidence that the original survey began at Lot One and the symmetry of the plan clearly indicated that as many twenty-five-foot lots as could be platted were laid down with Lots Twenty-two and Twenty-three remaining as remnants. These conditions in part support the court's ruling that where a plat showed all the lots fully and definitely dimensioned, but one was irregular and clearly a remainder left from applying the unit as far as possible, "the owner of the plat must be deemed to have intended to constitute the irregular remnant a lot by itself, regardless of its dimensions, and a purchaser thereof takes the whole remnant, whether of greater or less area than that indicated by the plat," and that "it [the irregular lot] can not be enlarged at the expense of the owners of other lots, nor, if of greater area than shown by the plat, diminished in their favor."[47]

Although a careful study of the case leads one to the con-

[45]113 Minn. 480, 130 N. W. 67.
[46]Porter v. Gaines, 151 Mo. 560, 52 S. W. 376.
[47]Brown (J.), Barrett v. Perkins, 113 Minn. 480, 130 N. W. 67, 69.

clusion that the shortage was correctly placed in the odd-shaped lot, it is emphatically wrong to regard such a parcel, when definitely dimensioned, as a remnant; for other

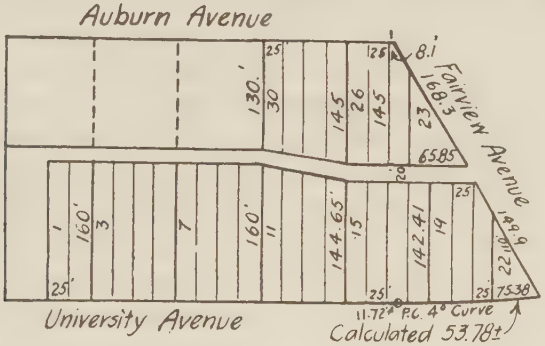

Fig. 41.

considerations such as topography, view and shade trees may make the lot the most desirable in the block. Furthermore it was not necessary to modify or make an exception to the general rule regarding the prorating of a deficiency, and investigation reveals that the case is very similar to that of Goldsmith v. Fillman,[48] and that the rules regarding the control of streets[49] and plats[50] as monuments are pertinent. Laying off the frontages along Auburn and University avenues and the alley causes a break in the line of Fairview Avenue which is shown as straight. The southwest corner of Lot Twenty-two plots approximately twenty-two (22) feet into the street, raising an inference that the engineer had made an error in transcribing his data upon the plat. The odd shape of Lots Twenty-two and Twenty-three points them out as most likely in error, and if the frontage of Lot Twenty-two is assumed as correct, that of Twenty-three must be changed by approximately ten (10) feet; while if the frontage of Twenty-three re-

[48]33 Pa. Super Ct. 44. See § 268.
[49]See § 252, Infra.
[50]See § 155, supra.

ported as 65.85 feet is correct, that of Twenty-two is calculated as very nearly 53.78 as against 75.38 feet indicated on the plat. It is seen at once that the digits of these two dimensions are the same, and this indicates that the error is in Lot Twenty-two.

The plat as a pictorial representation[51] shows a number of lots of uniform frontage with their side lines in alignment and Fairview Avenue as straight between Auburn and University avenues. Two odd-shaped lots are of necessity formed. The straightness of Fairview Avenue and the alignment of the plat should be maintained. Whether Fairview Avenue as shown on the plat or as it exists on the ground should prevail can not definitely be stated without further details, but in general the street as actually opened and used should control. The proper survey is to pick up the lot lines from landmarks in the blocks and lay off regular twenty-five-foot lots until Twenty-two is reached and bound this by last regular lot line and Fairview Avenue, which as a monument controls the distance call of 75.38 feet shown by calculation to be in error. Although the rules regarding the control of monuments and plats are merely presumptive and may be rebutted, they are infinitely stronger than the rules regarding the apportionment of a blunder, and therefore it is to be greatly regretted that the court in concluding said, "The rule [placing all the deficiency in a dimensioned odd lot] furnishes a definite and safe method and guide for the determination of mistakes of this nature."[52] The positiveness with which the rule was laid down has led to its citation in reliable encyclopediæ and to its adoption in other jurisdictions. This rule in its application overcomes an expressed intention which, although it may be in error, is the understanding of the parties at the time of the transaction.

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[51] See § 154, supra.

[52] Barrett v. Perkins, 113 Minn. 480, 130 N. W. 67, 70.

This conflict is forcibly set forth in the case of Mechler v. Dehn where Judge Cropsey of the New York Supreme Court[53] applied the rule as laid down in Barrett v. Perkins.[54] The lots in the subdivision were mostly twenty-five by one hundred feet but due to the fact that in a certain block two of the bounding streets were not parallel, the uniformity could not be maintained, and of necessity the lots along the turnpike were irregular in depth but were fully dimensioned. Subsequently it was discovered that there was a shortage in the frontage along Morton Avenue of five (5) feet seven-eighths (7/8) inch. It is clearly evident that had the platter known of this at the time of subdividing he would have assigned a depth to Lot One along Morton Street of one hundred and six (106) feet two (2) and one-eighth (1/8) inches. In this regard there can be no question; but, as a matter of fact, he was unaware of the shortage and assigned to the lot an unqualified depth of one hundred and eleven (111) feet three (3) inches, upon which various grantees had relied, and therefore it would be manifestly unfair to place all of a deficiency in the lots of odd depth.

When the case came before the Appellate Division, Judge Young aptly said[55]: "I do not believe that this rule [Barrett v. Perkins] is sound in principle. A party who maps a plot of land into lots, whether regular or irregular in size, and gives them certain dimensions on the map, believed by him to be accurate, can not, in my opinion, be held by any such strained construction to intend the irregular lots as a remnant, regardless of its dimensions. On the contrary, I think he believes and intends that each lot shown on the map, regular or irregular, has, or should have, the dimensions ascribed to it. Especially is this true in my opinion, where the socalled irregular lots constitute, as in

[53]117 Misc. 591, 191 N. Y. S. 650.

[54]113 Minn. 480, 130 N. W. 67.

[55]Mechler v. Dehn, 203 App. Div. 128, 131, 196 N. Y. S. 460.

the case at bar, approximately half the block." When it is considered that the intention to regard an irregular lot may be so easily expressed by qualifying its dimensions as more or less, the strength of this criticism is sustained, and it is clear that mere irregularity does not warrant an exception to the general rule. However, in the case of Mechler v. Dehn the deficiency was not apportioned according to the general rule because of other circumstances.[56]

VIII. EFFECT OF LOCATION OF DISCREPANCY BEING ESTABLISHED.

[§ 224.] When the footsteps of the surveyor can be definitely followed and the understanding of the parties at the time of the transaction is established beyond question, the excess or deficiency can be explained by evidence, and the rule has no application. In Schuster v. Myers[57] it was acknowledged that the three sixty-foot lots comprising a block had been laid off from the southeast corner indicated on the sketch, and that Myers had taken possession to the line AB exactly one hundred and twenty (120) feet from

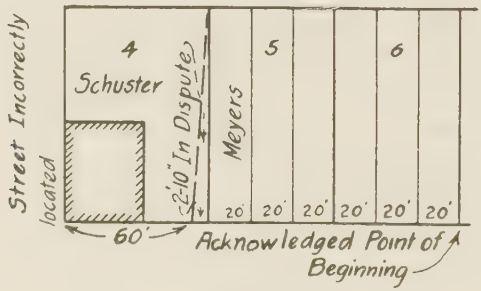

Fig. 42.

the recognized beginning point. Schuster first erected a building with its west line on the east line of the adjoining street extending forty-four (44) feet on the public square.

[56]See § 225, infra.

[57]148 Mo. 422, 50 S. W. 103.

Later when he erected an addition to the east it was found that there was a surplus of two (2) feet ten (10) inches in the block, and he acquired a quit-claim deed from the heirs of the original grantors. Myers contested this deed, and demanded his share in the excess, but the court held that the circumstances clearly placed the error in the location of the street to the west, and that following the footsteps of the surveyor placed the excess in the Schuster lot.

The case of Bloch v. Pfaff[58] is somewhat similar except that the lots were conveyed by a description without reference to a plat. The land involved lay on the north side of Elliott Street and was bounded by Pleasant Street on the west and the heirs of John Elliott on the east. The thirty feet adjacent to the Elliott heirs was first conveyed to John Innis and the adjoining thirty feet was subsequently conveyed to Nathan Whitmarsh. Later the remaining thirty-six feet between Whitmarsh and Pleasant Street was acquired by John Tuckerman. In the due course of time it was discovered that this lot contained more than its deed frontage and proceedings were started to apportion the excess. There was conflicting evidence as to the definition of the Elliott line, but the court held it sufficiently certain to warrant its use in laying down the grants, and thus permitted the seniority of the deeds to be given due consideration. The position of Pleasant Street was of no consequence in the location of the first two parcels, and the excess naturally fell in the corner lot. Judge Colt in his decision said "This rule is to be availed of when the land is conveyed by reference to a plan or there is some declaration in the deed indicating a purpose to divide land according to some definite proportion and when also there is no other guide to determine the location of the respective lots."

[58]101 Mass. 535.

IX. EFFECT OF REFERENCE TO A PLAT IN DESCRIPTION BY METES AND BOUNDS.

[§ 225.] Occasionally a particular description by courses and distances is followed by a reference to the property conveyed being a certain lot in a specified block. The description and plat may be and usually are in perfect agreement, and when a discrepancy is revealed in the practical location it may be difficult to determine whether or not the particular description establishes the intention of the grantor to relieve the grant so described from contribution to a deficiency or to deny it a share in the surplus. The issue must be decided according to the circumstances of each particular case.

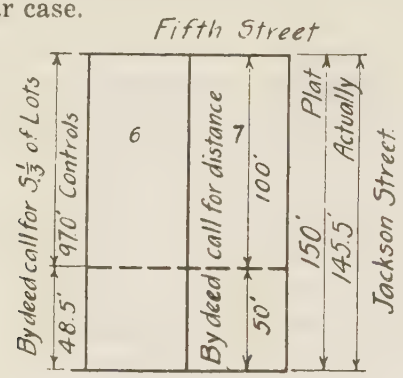

Fig. 43.

In Colter v. Mann,[59] the conveyance upon which the decision was based read: "Commencing at a point on Jackson and Fifth streets, being 100 feet from the corner of Jackson and Fifth streets; thence along said Jackson Street southward 50 feet, thence at right angles eastward—the same being the south 1/3 of lots 6 and 7 in block 16." The court noted that reference to the plat was necessary to locate the property conveyed, for otherwise it could have any one of four positions. This is technically but not prac-

[59] 18 Minn. 79.

tically true, for sufficient information is given in the following courses to overcome the evident omission. However, such reference revealed no inconsistency, for the plat dimensions of the lot checked the given courses and distances. The discrepancy arose from the fact that the actual depth of the lots on the ground was one hundred forty-five and one-half (145½) feet. It was impossible to start one hundred (100) feet from Fifth Street and lay off fifty (50) feet within the bounds of the grantor's land, and if fifty (50) feet was laid off northward of the rear line "the same" would be more than the south one-third of Lots Six and Seven. The only action which would comply with the expressed intention of dividing the lot in portions of one-third and two-thirds was to prorate the shortage making the distances along Jackson Street forty-eight and one-half (48½) and ninety-seven (97) feet.

In Mechler v. Dehn[60] the conditions were somewhat similar. The issue depended upon two original grants out of the subdividor, Ann C. Morton, the senior of which dated 1886 conveyed Lots One, Two, Three, Four, Five, Six, of Block Six to J. H. Gebhard by reference to the plat and by metes and bounds giving dimensions, qualified as more or less in strict conformity with the plat, but implying that the parcel was a parallelogram, whereas it was not. The junior grant was dated 1898 and conveyed to Joseph Burmel Lots Twenty-six, Twenty-seven, Twenty-eight, Twenty-nine and Thirty, Block Six, referring to the plat and stating that the same contained 12,500 square feet more or less. Mechler had acquired Lots One and Two in 1913 by a conveyance referring to the plat and describing them by courses and distances in substantial agreement with the plat. Dehn had acquired Lot Twenty-seven in 1906 from Burmel, the description merely referring to the lot by num-

[60] 203 App. Div. 128, 196 N. Y. S. 460.

ber and reference to the plan without giving the metes and bounds.

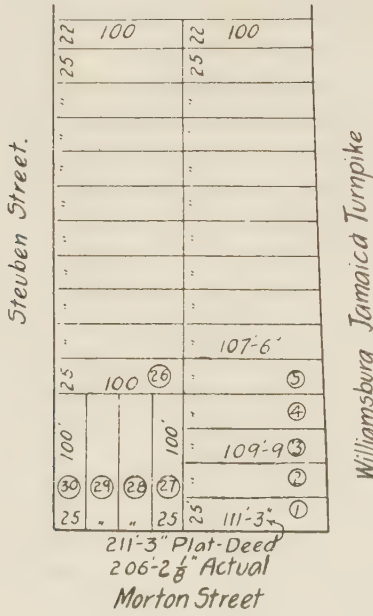

Fig. 44.

It developed that there was a shortage of five (5) feet, seven-eighths (⅞) of an inch in Morton Avenue and Dehn maintained that because of the irregularity of Mechler's lot, the same should bear the entire deficiency. As Dehn occupied the strip in controversy Mechler brought suit to eject, and the supreme court supported Dehn's contention.[61] Mechler appealed, and as already noted the appellate division held that the mere irregularity did not overcome the rule that a discrepancy is to be apportioned, and had the original grants of both parcels been solely by reference to the plat, the deficiency would probably have been prorated making Mechler's lot 108.58 feet deep. But Mechler traced title to the senior grant which described the par-

[61] See § 223, supra.

cel by courses and distances. Had there been no map this grant would have, concededly, established title to one hundred and eleven (111) feet three (3) inches on Morton Avenue. In contemplating the effect of the plat Judge Young asks, "How, by any legal principle, can the mere existence of the map and reference thereto, in the description in deeds, affect plaintiffs' legal right, except by arbitrarily correcting the mistake and apportioning the deficiency without any sound legal reason for such apportionment?"; and then states, "I do not think we are at liberty to presume from the mere reference to the map in the descriptions that the grantor intended to convey those lots in accordance with the frontage shown on the map, if it were there, or, if not, then in ratable proportion. * * * Plaintiff's grantor had a right to rely on the description in his deed and on the map, and also on the fact that, as this was the first conveyance on that frontage, the entire one hundred and eleven (111) feet three (3) inches called for by his deed was there on the ground. No survey was necessary to determine this fact, nor was he bound to know that there was a deficiency in the block. On the other hand, defendants' grantor knew when he received his conveyance that he could obtain only what was left. * * * Why, then, should plaintiffs now be called on to make up any portion of this deficiency."[62]

Another consideration which substantiates this reasoning is the object of describing a lot by courses and distances as well as by reference to a plan. The latter is sufficient for conveyancing, and the grantor must have had some purpose in using metes and bounds. Definite boundaries have a tangible value, and a grantor should have a means of assuring such to his grantee regardless of the accuracy of the plat. A statement that the land conveyed is within certain definitely described lines should accomplish this by exempt-

[62]Mechler v. Dehn, 203 App. Div. 128, 132, 196 N. Y. S. 460.

ing that portion of the plat from the application of the rule.

X. RULE TO BE APPLIED AS LAST RESORT.

[§ 226.] While it is true that in every careful survey measurements are made between established monuments, known distances apart, for the purpose of prorating measurements, this process is not strictly an application of the rule of apportionment. Its purpose is rather to compare the tape being used with that of the original survey, or to allow for the effect of temperature. The true application of the rule involves the distribution of a discrepancy.

When this is realized, it is evident that the rule of apportionment is merely one of construction and that the control of intention as effectively expressed seldom if ever aids in its application. When dimensions are given to all the lots of a block it is certain that the platter was unaware of any discrepancy, and when all but one are given, his intention is apparent, and the rule has no application.

The application where lots are conveyed by reference to a recorded plat is unfortunate. This method of description has much to commend it where the plat is of a high standard. It is compact and shows the relation of the lot to the entire block. Its great objection is well illustrated in Nilson v. Kahn.[63] Open as it is to the effects of apportionment, it defeats the very end to be sought in conveyancing and leaves the boundaries floating and frontages exposed to possible future assessments. Furthermore it breaks down the advantages of seniority of title. The grocer is expected to give full measure down to the bottom of the sugar barrel, and only the developer can force his past customers to con-

[63] 314 Ill. 275, 145 N. E. 340. See § 220, supra.

tribute to make up his shortage. The grantor has too many means at his command for evading the responsibility of guaranteeing the dimensions of the parcel conveyed, and any rule that further favors him should be applied with caution. It is true that the rule may work to the grantee's advantage in case of a surplus, but the gain is so slight that it does not offset the disadvantage of unstable boundaries. The only real gain to the grantees is the fact that the rule denies the original grantor title to a surplus, but they pay for this by relieving him of responsibility for his shortage.

When the rule is viewed in this light, existing lines assume a great importance. Where it is proved that they represent the limits within which the grantor has placed the grantee in actual possession they should stand, regardless of whether or not they have existed for a period to establish the line by adverse possession. Under these circumstances they are actual evidence of the understanding of the parties at the time of the transaction. Furthermore this conception of the problem breaks down the logic of the court's ruling in Nilson v. Kahn[64] where it was held that a conveyance by lot number and reference to a plat conveyed title, not to the frontage and depth shown thereon, but rather to such after an existing excess or deficiency had been prorated. Fifty feet should mean fifty feet no matter whether the representation of a frontage as such is in words or by figures on a plat. It is not logical to seal the merchant's scales to protect the buyer in the expenditure of his pennies and then to permit a developer to evade responsibility for his representations as based upon his own measurements.

Furthermore where the rule is applied it must of necessity violate the aim of boundary surveying as defined by

[64] 314 Ill. 275, 145 N. E. 340.

the courts themselves, namely to locate the lines, whether right or wrong, in their original position.[65] Where there is a discrepancy they are concededly in a confused position, but this does not warrant departure from the basic rule nor justify the application of a rule of thumb, that locates the boundaries in compliance with the actual situation rather than that understood as representative of the block at the time of the original transactions.

The contention that the original grantor should be held responsible for any shortage in a block does not necessitate the concession that title to an excess remains in him. The plat which is his own representation of the land that he is conveyancing shows no land forming an excess which he intends to reserve for himself, and while there may be some question as to whom such land rightfully belongs, it is clear that it is not the original grantor's.

The time element also has a bearing. In Vance v. Gray[66] Judge Lassing of the Kentucky Court of Appeals said: "If we were back at the parting of the ways, and the original grantors were before us, and the conditions had not been changed, the case might be possibly worked out along the lines mapped out in the case of Smith and Preston v. Prewit[67] [where apportionment was applied]. But here, after a lapse of forty years during which time conditions have changed, the property passed into other hands, and improvements been made thereon, it will readily be seen that upon no just or equitable principle can the rule adopted in those cases be applied."

These considerations clearly establish the regard to be given to the rule. The construction of deeds and the legal effect thereof is a question of law,[68] for the courts to de-

[65]Smith v. Almond, 157 La. 265, 102 So. 330. See § 76, supra.
[66]142 Ky. 267, 134 S. W. 181, 182.
[67]2 A. K. Marsh (9 Ky.) 155.
[68]Viall v. Hurley, 94 Vt. 410, 117 Atl. 395.

cide[69] and it is not for the engineer in a given case to attempt to force his theories. Rather it is his duty to search diligently for evidence of the existence of lines of occupation and such facts as will locate the position of the error, so that the court may have more tenable grounds for its decision and be relieved of the necessity of applying the rule. That the courts do not hold the rule in high regard is established by the relatively few cases in which it is resorted to, and the qualification that it is applied only in the absence of any marking on the ground of the division lines between the lots.

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[69]Belk v. Vance, 165 N. Car. 673, 81 S. E. 946.

CHAPTER IV.

HIGHWAYS AND STREETS AS BOUNDARIES.

I. FEE CARRIED TO CENTER.

Section.

230. The Rule.
231. Reason for Rule.
232. Effect of Manner of Establishment—General.
233. By Condemnation Proceedings.
234. By Dedication.
235. By Prescription.
235.1. Effect of Reference to Plat.
235.2. Conveyance by City or State.
236. Limitations and Modifications—Grantor Must Have Fee in Highway.
237. Effect of Highway on Margin of Grantor's Land.
238. Effect of Highway Along Shore.
239. Street as a Monument—Control of Intention.
240. Control over Course and Distance.
241. Effect of Failure to Mention Street.
242. Presumption Rebutted—General.
243. Effect of Call for Side Lines—General.
244. New Jersey Rule.
245. Highway Referred to but not Called for.
246. Street not Opened or Vacated.
247. Private Ways.

II. LOCATIONS OF STREETS.

248. Importance.
249. Effect of Establishment—By Statutory Proceedings.
250. By Dedication.
251. By Prescription.
252. The Rule.
253. Applications—Control of Street Monuments — General.
254. Necessity of Identification.
255. Control of Lines Run—General.
256. Effect of Conflict Between Monuments and Improved Street.
257. Private Improvements.
258. Control of Lines in Adjacent Blocks.
259. Control of Lines of Continued Occupancy.
260. Control of Recognized Lines.
261. Control of Maps — Evidence of Location.
262. Evidence of Intention.
263. Map as a Monument.
264. Map Yields to Actual Location.
265. Effect of Street Existing on Map Only.
266. Effect of Time Element.

III. RELATION BETWEEN STREET AND PRIVATE BOUNDARIES.

Section.
267. Private Boundaries Determined by Street as of Date of Deed.
268. Effect of Reestablishment of Street.
269. Side and Rear Lot Lines Fixed by Interior Lines of Block.
270. Effect of Call for Quantity—Satisfied by Center Line.
271. Satisfied by Side Lines.

IV. REVERSION.

272. The Rule.
273. Effect of Manner of Establishment.
274. Special Application of the Rule.
275. Fee to be Taken by Extending Side Lines.

I. FEE CARRIED TO CENTER.

[§ 230.] (A) The Rule.—Chief Justice Chase said, "It is a familiar principle of that law, [referring to the statute law of Illinois regarding dedication] that a grant of land bordering on a road or river, carries title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines."[1] The title of the land in the roadway is, of course, subject to the public easement. This rule is applied to land described as "bounded on," "running along the highway," and the like, even though the expressed dimensions exclude the highway,[2] and in no wise conflicts with the principle that a call for a monument takes to an exterior point or line of the same, as is explained by Justice Gray in the following: "Whenever land is described as bounded by other land or by a building or structure, the name of which, according to its legal or ordinary meaning, includes the title in the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply *by* an object, whether natural or artificial, the name of which is used in ordinary speech,

[1]Banks v. Ogden, 2 Wall. (69 U. S.) 57, 68, 17 L. ed. 818.

[2]Firmstone v. Spaeter, 150 Pa. 616, 25 Atl. 41, 30 Am. St. 851. See Cox v. Freedley, 33 Pa. St. 124, 75 Am. Dec. 584 (§ 104, supra).

as defining a boundary and not as describing title in fee, and which does not in its description or nature include earth as far down as the grantor owns, and yet which has width as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the center of the thing so running over or standing on the land is the boundary of the lot granted."[3]

[§ 231.] **(B) Reason for Rule.**—The basic reasons for this rule are: (1) the absence of practical use to the grantor of relatively small, odd shaped parcels of land which would remain in his possession;[4] (2) the greater value to the grantee who has acquired adjacent land, and who has an immediate interest in the properties adjoining;[5] (3) the public convenience, which is best served by having control of highways and streets in the owners of adjacent properties, rather than in distant owners, who have no incentive to keep them up;[6] (4) the concern of the state and other political units as to who shall determine and pay for improvements;[7] (5) prevention of disputes regarding precise boundaries;[8] (6) the embarrassment and confusion which would prevail if a different rule existed.[9]

[§ 232.] **(C) Effect of Manner of Establishment.—(1) General.**—For the rule to operate it is essential that the fee in the street is in the grantor, and unless somewhere in the chain of title there is an expressed reservation excluding the street, the title to the way will be dependent upon the details of the establishment. This involves a search of the road dockets, city ordinances, and other records usually not resorted to in the ordinary survey.

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[3]Boston v. Richardson, 13 Allen (95 Mass.) 146.

[4]Johnson v. Grenell, 112 App. Div. 620, 98 N. Y. S. 629.

[5]White v. Jefferson, 110 Minn. 276, 124 N. W. 373, 125 N. W. 262; Henry v. Diocese of Kentucky, 207 Ky. 846, 270 S. W. 476.

[6]Durbin v. Roanoke Bldg. Co., 107 Va. 753, 60 S. E. 86.

[7]Kimball v. Kenosha, 4 Wis. 321, 336.

[8]Durbin v. Roanoke Bldg. Co., 107 Va. 753, 60 S. E. 86.

[9]Paul v. Carver, 26 Pa. 223, 67 Am. Dec. 413.

[§ 233.] (2) **By Condemnation Proceedings.**—In general the fee in land embraced in streets established by condemnation remains in the abutting owners. Statutes authorizing the exercise of the power of eminent domain are in derogation of the common law, and their provisions with respect to the interest to be taken are to be strictly construed, and where the interest to be taken is not expressly stated in the statute, the condemnor is presumed to take no greater interest than an easement, if an easement is sufficient to satisfy the purposes of taking.[10] It is generally held that the requirements of the public use of a highway,[11] street[12] or alley[13] are satisfied by an easement, and that the laying out of a highway does not divest the owner of title,[14] and that he may use the land in the street for purposes not inconsistent with the easement.[15] The legislature can authorize the acquisition of such title to land taken for public use as will leave no right remaining in the original owner,[16] and under the express terms of such statutes a title in fee simple is acquired by proceedings to condemn a public way and the owner is divested of his former rights in the property condemned.[17] Thus where condemnation proceedings were made in compliance with a city charter which provided that upon the proper payment of the amount awarded, fee in the land was vested in the city, the city acquired the fee of the land, subject to an easement of a railroad for its right of way.[18] Furthermore where the act authorizing condemnation specified "such lands and

[10]Warm Springs Irr. Dist. v. Pacific Live Stock Co., 270 Fed. 560.

[11]Sears v. Chicago, 247 Ill. 204, 93 N. E. 158.

[12]Moran v. Gallagher, 199 Mass. 486, 85 N. E. 579, 20 L. R. A. (N. S.) 116.

[13]Smith v. Minneapolis, 112 Minn. 446, 128 N. W. 819.

[14]Dierksen v. Pahl, 194 Iowa 713, 190 N. W. 423.

[15]Lexington v. Suburban Land Co., 235 Mass. 108, 126 N. E. 360.

[16]Lincoln Safe Dep. Co. v. New York, 210 N. Y. 34, 103 N. E. 768, 1915F, L. R. A. 1009.

[17]People v. Allen, 209 Mich. 102, 176 N. W. 468.

[18]New York Cent. &c. R. Co. v. Buffalo, 200 N. Y. 113, 93 N. E. 520.

property shall vest in and belong to the said mayor, aldermen, and commonalty and the said county for purposes of this act," the title vested in the municipalities named in fee simple without any right of reversion in the original owner.[19]

[§ 234.] (3) **By Dedication.**—A common-law dedication confers only an easement and leaves the legal title in the street in the adjoining owner,[20] and in some states dedications pursuant to the statutes do not pass fee simple thereto, but only such an estate as the purpose of the trust requires, and the fee simple title subject to the public easement remains in the dedicator and his grantees.[21] In other jurisdictions the surveying and platting of land and acknowledging and placing on record a plat thereof has the effect of conveying a fee to the city of such portions of the premises platted as donated to the public.[22] As a plat was unknown to the common law it is important that it be in substantial compliance with the statutes, for if defective it will operate as a common law dedication, and the city will acquire only an easement, the fee remaining in the abutting owners,[23] and a corrective ordinance subsequently passed attempting to make the plat conform to the statutes will not give fee to the city, for such effect would be taking private property without due consideration.[24]

In the downtown district of Chicago certain streets were laid out by plats not properly certified and acknowledged, and the property owners abutting these have fee to the center line subject to the easement in the public[25] while

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[19]In re Jerome Ave., 54 Misc. 345, 105 N. Y. S. 1009.

[20]Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178.

[21]Betcher v. Chicago, M. &c. R. Co., 110 Minn. 228, 124 N. W. 1096. See §§ 366, 371, infra.

[22]Sears v. Chicago, 247 Ill. 204, 93 N. E. 158.

[23]Northwestern Safe & Trust Co. v. Chicago, 247 Ill. 238, 93 N. E. 169.

[24]Sears v. Chicago, 247 Ill. 204, 93 N. E. 158.

[25]Farwell v. Chicago, 247 Ill. 235, 93 N. E. 168; Illinois Tr. & Sav. Bank v. Chicago, 247 Ill. 264, 93 N. E. 167.

other streets were dedicated by plats in substantial conformity with the statutes and therefore fee was vested in the city, leaving the adjoining owners only an easement of light, air, and access.[26]

In the jurisdictions where a statutory dedication vests the fee in the county, city, or municipality due regard should be given to the statute requirements regarding acceptance, for where such is necessary, and has not been made, the fee remains in the dedicator and his grantees subject to the public easement,[27] but where acceptance is not specified mere filing and recording[28] or sale with reference to a recorded plat[29] vests fee simple in the city.

[§ 235.] (4) **By Prescription.**—Inasmuch as an easement will confer upon the public all the rights essential for the use of way as a street, an easement rather than a vesting of fee is acquired by prescription, and the title in the roadway remains in the owner of the adjoining land.[30]

[§ 235.1.] (D) **Effect of Reference to Plat.**—In most jurisdictions the rule is extended so that a grantee of a lot in a recorded plat takes title to the center of an adjoining street subject to the public easement, though the land is described only by lot number[31] or by metes and bounds extending to the line of the highway or street without express reference thereto,[32] for the value of the lots so sold depends largely upon the rights in the adjacent streets,

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[26]Ryerson v. Chicago, 247 Ill. 185, 93 N. E. 162.

[27]Point Pleasant v. Caldwell, 87 W. Va. 277, 104 S. E. 610. See §§ 370, 371, infra.

[28]Douglas County v. Lawrence, 102 Kans. 656, 171 Pac. 610.

[29]Larkey v. Los Angeles, 70 Cal. App. 635, 233 Pac. 991.

[30]Johnson v. Robertson, 156 Iowa 64, 135 N. W 585; District of Columbia v. Robinson, 180 U. S. 100, 45 L. ed. 440, 21 Sup. Ct. 283.

[31]Shaw v. Johnson, 17 Idaho 676, 107 Pac. 399; Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21. To the contrary Merrill v. Newton, 99 Mich. 225, 58 N. W. 70.

[32]Wegge v. Madler, 129 Wis. 412, 109 N. W. 223, 116 Am. St. 953. See also minority opinion in Anderson v. Citizens Sav. &c. Co., 185 Cal. 386, 197 Pac. 113, where contrary was held.

and therefore the control of the latter should pass with the title to the lots. This rule is of course subject to the effect of the plat as a statutory dedication, and where the plat vests fee in the municipality the grantor has no title in the street to pass to the grantee.[33] However if the grantor conveys lots according to such a plat, and bounds them expressly on the exterior lines of the streets, the grantee does not acquire the fee to any part of the street.[34]

[§ 235.2.] (E) Conveyance by City or State.—The reasons for the rule may be overcome, or public policy may outweigh them to such an extent that they no longer hold. Thus a conveyance made by a city does not carry fee to the center,[35] for the street is still of importance and benefit to the city whose officials are custodians of it for public use.[36]

The elements tending to overcome the general rule are not so strong in case of the state as in that of the city, and area and distance have in the past made it impossible for the state to give the detailed supervision to the highways that a city gives to its streets. Therefore in most jurisdictions and in the absence of statute or reservation, a grant from a state takes to the center of the highway or street the same as from an individual.[37] The comparatively recent development of our highways and the organization of efficient highway departments is placing the state in somewhat the same relation as the city, and it is reasonable to expect that in time the general rule will no longer prevail in conveyances by the state. In fact the Texas Court ruled in 1918 that the reasons for the rule (that the conveyance of a lot as bounded by a street carried the fee to the center line) do apply when the government, state or municipality,

[33]See § 232, supra.

[34]Trowbridge v. Ehrich, 191 N. Y. 361, 84 N. E. 297.

[35]Graham v. Stern, 168 N. Y. 517, 61 N. E. 891.

[36]Webber v. Gillies, 112 N. Y. S. 397.

[37]Paige v. Schenectady R. Co., 77 App. Div. 571, 79 N. Y. S. 266.

owns the land and makes a conveyance calling for a highway.[38]

[§ 236.] (F) **Limitations and Modifications. — (1) Grantor Must Have Fee in Highway.**—The general rule naturally can not control where the grantor has no title to the highway, and when the fee in the highway is once relinquished, no subsequent grantee can claim it. Thus in 1871 Ebert conveyed to Case "All block numbered twelve (12) in Case and Ebert's addition to the city of Denver; also doth quitclaim all title, in being and reversion, to the land now occupied by Depot Street * * * lying contiguous to and adjoining said block." Later in 1878 Case conveyed to Ebert "all of block number twelve (12) in Case and Ebert's addition to Denver, together with, all and singular, the hereditaments and appurtenances." It was held that neither Ebert nor his subsequent grantees had fee to the center of Depot Street for the first conveyance of 1871 showed that Case and Ebert considered Depot Street as a separate and distinct parcel of land, and as no mention of it was made in the second deed of 1878, the title to it remained in Case.[39]

[§ 237.] (2) **Effect of Highway on Margin of Grantor's Land.**—A logical modification is apparent from a consideration of the basis of the rule, which is founded on the assumption that the land for the highway was contributed equally by adjacent land owners. If it can be established that such is not the case, and that it was taken entirely from one property, a conveyance of property on the other side of the road carries fee to the side line only, for the fee to half the highway was never in the grantor, and a deed conveying land bounded by a highway laid along the margin

[38]Schutze v. Dabney (Tex. Civ. App.), 204 S. W. 342. See also McDonald v. Kummer, 56 Colo. 153, 137 Pac. 51.

[39]Overland Mach. Co. v. Apenfels, 30 Colo. 163, 69 Pac. 574.

of a grantor's land carries fee to all the land of the highway subject to the public easement.[40]

The case of Saccone v. West End Trust Company[41] illustrates this modification and the strong regard the courts give to the general rule. Prior to 1832 Robert A. Caldcleugh platted a rectangular lot facing one hundred (100) feet on Penn Square and sixty-two (62) feet on Broad Street as shown in the sketch. In April 1832 he deeded these lots describing each of the four nearest Broad Street

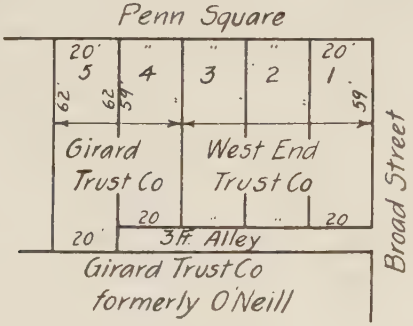

Fig. 45.

as extending "to a three feet wide alley laid out and opened by said Robert A. Caldcleugh for the accommodation of this and other lots adjoining thereto, and leading westward from the said Broad Street." The deed of the fifth lot extended the grant sixty-two (62) feet from Penn Square and each of the five deeds contained a grant of "the free use and privilege of the said three feet wide alley as and for a passageway and water course in common with the owners." In November of 1846 Robert O'Neill acquired title to the property to the south, and in June of 1848 Cald-

[40]Haberman v. Baker, 128 N. Y. 253, 28 N. E. 370, 13 L. R. A. 611; Rowe v. James, 71 Wash. 267, 128 Pac. 539.

[41]224 Pa. 554, 73 Atl. 971, 24 L. R. A. (N. S.) 539.

cleugh conveyed to O'Neill the soil of the alley in fee subject to the uses and privileges granted to the owners of the lots adjoining. In August 1849 O'Neill conveyed to Wickersham the premises *south* of the alley "together with the free and common use and privilege of the aforesaid three feet wide alley as and for a passageway and water course into and from Broad Street at all times forever." Subsequently by various conveyances the West End Trust Company acquired Lots One, Two, and Three and the Girard Trust Company Lots Four and Five and the property on Broad Street formerly belonging to Robert O'Neill. In 1905 the alley which had been open for seventy-three years was closed and Saccone and other heirs at law of O'Neill laid claim thereto based on the assumption that the deed of June 1848 (Caldcleugh to O'Neill) conveyed the fee in the alley, and on the fact that O'Neill conveyed to Wickersham only the premises south of the alley, thus leaving title to the land in dispute in himself and his heirs.

The court held that, as the alley was along the margin of the property, Caldcleugh's grantees under the four deeds of April 1832 took fee simple title to so much ground in the alley along the edge of Caldcleugh's land as lay immediately in the rear of the lot he bought, subject to easements, and that Caldcleugh parted with all his interests at that time, and had no title in the soil in the alley to pass by deed of June 1848 to O'Neill. Therefore the fact that the conveyance out of O'Neill gave only an easement and left the fee in him and his heirs at law was of no consequence, for he could not retain what he did not possess. It was probably a realization of the defect in the title to the alley that led O'Neill to grant only the easement, and certainly the present value of the alley was not foreseen. Under the circumstances it appears the decision is in accord with the understanding of the parties at the time of the early conveyances.

[§ 238.] (3) **Effect of Highway Along Shore.**—There is some conflict in regard to the application of the rule where the street is bounded on one side by a lake shore or a river. In Banks v. Ogden[42] it was held that when a street

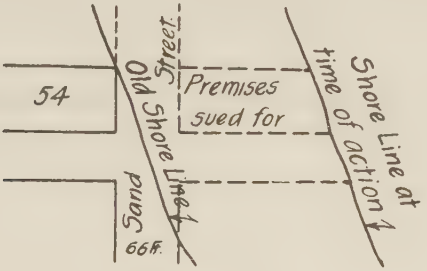

Fig. 46.

of an addition is bounded on one side by the shores of a lake the owner of a block on the other side takes only to the center, while the fee to the other half bounded by the lake remains in the proprietor subject to the public easement, and that when the lake boundary so limits the street as to reduce it to less than one half its regular width, the street so reduced must still be divided by its center line between the grantee and the original proprietor. In contrast to this it was held in Wait v. May[43] that where a lot is conveyed by reference to a plat showing a street along a shore the fee, subject to the public easement, of the entire street to low water, together with the riparian rights, passed to the grantee. An important element, often overlooked, is brought out in Gifford v. Horton[44] where the court held that the grantee of lots fronting on a public street which borders on a navigable lake and *beyond which there*

[42] 2 Wall. (69 U. S.) 57, 17 L. ed. 818, cited in Hobart v. Hall, 174 Fed. 433, 442; Ocean City Hotel & Dev. Co. v. Sooy, 77 N. J. L. 527, 73 Atl. 236.

[43] 48 Minn. 453, 51 N. W. 471, cited in Empenger v. Fairley, 119 Minn. 186, 137 N. W. 1110 (see § 246, infra); Hall v. Connecticut Mut. Life Ins. Co 76 Minn. 401, 79 N. W. 497.

[44] 54 Wash. 595, 103 Pac. 988.

is no property susceptible of private ownership took fee to the entire street, unless the grant or the circumstances limited the conveyance to the center line.

Thus in Irvin v. Crammond[45] Chief Justice Hottel of the Indiana court cited and upheld the principle extending the fee to the shore as established in Wait v. May[46] and rightly ruled that it did not apply, but although arriving at a correct decision erred in applying the principle as set forth in Banks v. Ogden[47] for in the case in question there was

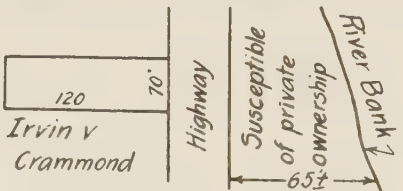

Fig. 47.

some sixty-five feet of land between the highway and the shore, whereas in both Wait v. May and Banks v. Ogden it specifically states the highway is bounded on one side by the shore. This distinction is brought out in the case of Childs v. Dahlke[48] where a narrow strip intervened between a street and a canal and limited the fee in lots on the other side of the street to the center line. In general where property susceptible of private ownership is shown between the street and the shore, the case does not fall within the conflicting citations of Banks v. Ogden[49] and Wait v. May,[50] and the fee is limited to the center line of the street.[51]

The case of Fuller v. Bilz[52] involves a street which, in reality, was bounded by a shore, but the plat showing the

[45]58 Ind. App. 540, 108 N. E. 539.
[46]48 Minn. 453, 51 N. W. 471.
[47]2 Wall. (69 U. S.) 57, 17 L. ed. 818.
[48]151 Wis. 82, 138 N. W. 277.
[49]2 Wall. (69 U. S.) 57, 17 L. ed. 818.
[50]48 Minn. 453, 51 N. W. 471.
[51]Haslett v. New Albany, Belt & Term. R. Co., 7 Ind. App. 603, 34 N. E. 845; Nichols v. New England Furn. Co., 100 Mich. 230, 59 N. W. 155. See also Shenley v. Pittsburgh, 105 Pa. 472 (§ 159, supra).
[52]161 Mich. 589, 126 N. W. 712.

drive in question also delineated lots laid out on the lake side mostly under water. It was held by the court that under these circumstances, the plat limited the grant to the center line of the street in question despite the fact that in this particular jurisdiction when a street was bounded on one side by a lake or river the fee to the lot extended to the shore.

When regard is given to the purpose of extending the fee to the center line of a bounding road, the principle as set forth in Wait v. May, where a street along a shore is regarded as on the margin of the subdividor's land and the fee of the abutting lots is carried to the far or shore side of the street or road, is the more logical. If it is not applied, and the rule of Banks v. Ogden is used, there is present the possible development of relatively small odd shaped parcels of land which would revert to the original grantor, and disputes regarding exact boundaries and riparian rights would be greatly encouraged.[53]

Furthermore lots on a street along a shore usually have a greater value for commercial and resort purposes, and the limitation of the fee to such lots to the center line of the street, leaving the ownership of the balance of the roadway in a remote grantor, largely offsets this increased value. And lastly, it is so easy for the subdividor to express his intention to limit the fee to the center line of the street on a shore by the delineation on the plat of a line representing the shore side of the street and upland side of a narrow strip susceptible of private ownership, that the absence of such a line is sufficient to warrant the presumption that he regarded the shore street as marginal and reserved no fee in it.

[§ 239.] (G) Street as a Monument.—(1) Control of Intention.—The principle of control of intention as effectu-

[53]See § 231, supra.

ally expressed and not merely surmised is the basic consideration of an understanding of highways and streets as boundaries. This, together with the source and extent of the grantor's title is the key to the solution of the various problems which arise. The presumption is always that a grantee takes fee to the center of the highway or street, but it is to be remembered that this is a rule of construction and is to be applied to ascertain the intention of the parties[54] as determined by the consideration of the language used and such circumstances as may be properly considered, as, reference to the situation of the lands and the relation of the parties to them.[55] The strength of a street as a monument and of the intention to recognize it as a boundary is well illustrated in Coppin v. Manson[56] where the court ruled that if a street as actually located left a space between the street line and a lot which was sold as abutting thereon, as shown by a plat with reference to which the lot was sold, title to such space would vest in the purchaser of the lot to the center of the street as shown in the plat and not to the subsequent purchaser of all unplatted land. The lot in question was a corner lot, and the land involved was between it and the street on the side line. The situation arose because of a surplus of thirty-three (33) feet in a frontage of four hundred (400) feet.

[§ 240.] (2) **Control Over Course and Distance.**—If a deed calls for a monument at the side of the street and thence "along the street," "by the street," etc., the conveyance carries the fee to the center line of the street, even though the distances may reach only to the side line. Thus a deed reading in part as follows "beginning at the northwesterly corner of a piece of land conveyed to me by Sylvester Crosby, thence by several courses to a road, thence

[54]Gray v. Kelley 194 Mass. 533, 80 N. E. 651.

[55]Graham v. Stern, 168 N. Y. 517, 61 N. E. 891.

[56]144 Ky. 634, 139 S. W. 860.

southwesterly by about four hundred and thirty-three feet to a stone wall, thence southerly by a stone wall," etc. "to point of beginning," included one-half of Chelmsford St. the road in question, although the stone wall mentioned stood on the southeast side. The court held that this was the intention of the parties, for otherwise the deed would have been drawn to read "thence by side of the road."[57]

A road as a monument will prevail over courses and distances, and when called for as a boundary may limit or extend the grant. In Foley v. McCarthy[58] an error had been made in the measurement of depth of certain lots included between a railroad right of way and a street. Consequently the plat dimensions were too great, and these were used in the deed description which further called for the side line of the street as a boundary. At the time of purchase this side line was visibly marked by stakes standing about one foot above the ground. The purchaser in taking possession attempted to erect a fence out in the street, the deed distance from the right of way. The court held that the side line of the street was the true boundary on the grounds that as a monument it prevailed over courses and distances.

[§ 241.] (3) **Effect of Failure to Mention Street.**— The strength of the presumption is shown in Durbin v. Roanoke Building Company[59] where the bounding street was not mentioned. The deed conveying the entire tract into the Roanoke Company described the southern boundary as "running with Walnut Street N 67°-15′W 168. feet to Marion Street." When they conveyed to Ellis, a predecessor to Durbin in title, this same boundary was described as "N 67°-16′W 156.65 feet" without any mention of Walnut Street. It was admittedly the same line as in the previous deed, the difference in length being due to the establishment of an alley. The court held that where a deed

[57]Dean v. Lowell, 135 Mass. 55.
[58]157 Mass. 474, 32 N. E. 669.
[59]107 Va. 753, 60 S. E. 86.

describes a lot as extending to a street thereby conveying title to the center of the street, subject to easement of right of way, a subsequent deed, by the grantee of the first deed, conveying the same lot by courses and distances, but not calling for the street as a boundary, will be held to also carry the fee to the center of the street.[60]

In Van Winkle v. Van Winkle[61] where the land was conveyed by courses and distances without mentioning a street by which the same was bounded, and it turned out in fact that it was bounded by a street, the presumption was likewise maintained, and fee to the center of the street was deemed to be included. The contention here involved a beginning point described as "stake by a fence" and a course running along the fence. The court in making the decision suggested (a) the impracticability of placing a stake in the roadway, (b) the mention of the fence merely as a witness, and (c) if the intention had been to exclude the highway, the beginning point would have been described as "stake at side of highway," and the course as "thence along side of highway."

[§ 242.] **(H) Presumption Rebutted.—(1) General.**—The presumption must yield when the reasons for its existence are displaced by other evidence.[62] An intent to exclude the highway will never be presumed, but must appear from the terms of the deed as read and interpreted in the light of surrounding circumstances.[63]

[§ 243.] **(2) Effect of Call for Side Lines.—(a) General.**—If it is clearly expressed that the side line of a street restricts the conveyance, the presumption is clearly overcome, and the street is excluded;[64] and where a deed de-

[60]Durbin v. Roanoke Bldg. Co., 107 Va. 753, 60 S. E. 86.

[61]184 N. Y. 193, 77 N. E. 33.

[62]Dernham v. Williams, 37 N. Y. 251.

[63]Mott v. Mott, 68 N. Y. 246; Gosstol Realty Corp. v. Gillman, 224 App. Div. 63, 229 N. Y. S. 201.

[64]Baltimore & O. R. Co. v. Gould, 67 Md. 60, 8 Atl. 754.

scribes land as "beginning at a certain point" and running "to the road" and thence in "line of road" the measurements being exact and reaching only to the side of the road, it has been held that title does not include the highway.[65] Likewise if two points on the side line of a street are fixed as the beginning and end of the course, the boundary will be the side line of the street.[66] Furthermore in the determination of whether or not a deed conveys title to the center of the street, the starting point is of great importance, and while not conclusive, must control other parts of the description, at least in the absence of irreconcilable inconsistency. Thus a deed reading "beginning at the northwesterly corner of Walnut Street and Second Avenue as laid down on said map; thence running westerly along said street fifty (50) feet; thence northerly parallel with said avenue one hundred (100) feet, thence easterly parallel with said street fifty (50) feet; thence southerly along said avenue one hundred (100) feet to the corner aforesaid and place of beginning," conveys no fee to land in the street. The point of beginning is clearly the intersection of the north line of Walnut Street with the west line of Second Avenue, and the description by metes and bounds clearly excludes the street.[67]

A description of land conveyed as beginning at a point formed by the intersection of the southerly line of M Street with the westerly line of S Street running westerly along the southerly line of M Street clearly excludes the interest in the bed of the street.[68]

[§ 244.] **(b) New Jersey Rule.**—In contrast to these is the ruling of the New Jersey court in Wiedmer v. West

[65]Cole v. Haynes, 22 Vt. 588; De Baun v. Pardee, 139 N. Y. S. 1077. See § 240, supra.

[66]Patten v. New York Elev. R. Co., 3 Abb. New Cas. (N. Y.) 306, 342.

[67]Woolf v. Pierce, 209 N. Y. 344, 103 N. E. 508. See also Kings County Fire Ins. Co. v. Stevens, 87 N. Y. 287, 41 Am. Rep. 361.

[68]Kehres v. New York, 162 App. Div. 349, 147 N. Y. S. 825.

Jersey & S. R. Co.[69] where a deed describing a platted lot as abutting upon the exterior lines of the street and as containing a certain area, which was satisfied by the exterior street lines, was held to convey the fee to the land in the street. In support of this the court cited Salter v. Jonas[70] where the deed read: "Beginning at a stake standing at the junction of the easterly line of Rowland Street with the northerly line of Johnson Street, * * * and running thence along the northerly line of Johnson Street S 23°-40′ E 50 feet, to a stake; * * * to a stake in the said easterly line of Rowland Street; thence along the same S 66°W 100 feet, to the beginning," and the court held that the street to the center was included, because nothing short of express words will prevent such inclusion.

These decisions are in conflict with those of other jurisdictions, and *with* the strict interpretation of the general rule as laid down by Justice Gray and generally recognized; but are in perfect harmony with reasons and purpose of the rule, and with the principle that a reservation must be expressed. While a street is burdened with a public easement, the fee is usually of little value to the lot owner; and in nine cases out of ten it is doubtful if the principals in a transaction have a clear understanding regarding as to whether it is to pass or be retained. For this reason alone there is much to commend the New Jersey rule.

[§ 245.] (3) **Highway Referred to but not Called For.**—A deed for a certain right of way, one hundred (100) feet in width, called for a strip fifty (50) feet each side of the center line as located "subject to public road as it now runs." The road mentioned was forty (40) feet wide with its center line along a certain section line and overlapped the right of way above described four (4) feet. Upon the abandonment of the highway the railroad claimed fee to

[69]98 N. J. L. 316, 119 Atl. 776. [70]10 Vroom (39 N. J. L.) 469.

the sixteen-foot strip between its right of way and the section line. The court ruled that the highway was not called for as a boundary and that mention of it was evidently made so that there might be no misunderstanding regarding the four-foot strip common to the road and to the right of way, and that therefore the grant was limited to the one hundred-foot right of way with its western side sixteen (16) feet from the section line.[71]

[§ 246.] (4) **Street Not Opened or Vacated.**—There is some authority that the doctrine carrying the fee conveyed to the center line of a street or highway is limited to actual highways and is not to be applied to mere paper streets.[72] Thus where one buys lots according to a plat and the streets are unopened, he acquires only an easement therein and can not take possession of any part thereof,[73] unless the terms of the conveyance expressly carry his grant to the center line as in Clymer v. Roberts[74] where the property was described as extending "to middle line of Howard Street (50 feet wide); thence along the middle line of Howard St." This grant was held to give fee to twenty-five (25) feet of Howard Street and an easement over the balance, regardless of the fact that Howard Street existed on the plat only, and hence according to the rule of the particular jurisdiction would not ordinarily be included. The language left no question regarding the intention and hence prevailed. It is more generally held that a conveyance of land bounded on a highway, street, or alley carries

[71]Chicago & E. I. R. Co. v. Willard, 245 Ill. 391, 92 N. E. 271.

[72]Plumer v. Jonnston, 63 Mich. 165, 29 N. W. 687; Hopkinson v. McKnight, 31 N. J. L. 422; Southerland v. Jackson, 30 Maine 462, 50 Am. Dec. 633; Cole v. Philadelphia, 199 Pa. 464, 49 Atl. 308; Saccone v. West End Trust Co., 224 Pa. 554, 73 Atl. 971, 24 L. R. A. (N. S.) 539; Clymer v. Roberts, 220 Pa. 162, 69 Atl. 548; Palmer v. Dougherty, 33 Maine 502, 54 Am. Dec. 636.

[73]Merrill v. Newton, 99 Mich. 225, 58 N. W. 70; Palmer v. Dougherty, 33 Maine 502, 54 Am. Dec. 636.

[74]220 Pa. 162, 69 Atl. 548.

with it the fee to the center thereof, subject to the public easement, provided that the grantor at the time of the conveyance owned thereto and there are no words in the deed showing a contrary intent, regardless of whether or not the highway, street, or alley has been accepted or opened.[75]

The Federal Court of the Sixth District held in an Ohio case that where various deeds described lots by reference to a plat which showed them as bounded by a certain street, the statutory dedication of which had been vacated at the time, the fee of the land was, in each case, carried to the middle of the closed street opposite the several lots notwithstanding the dimensions of the lots did not include the street.[76] In Kansas the Supreme Court held that upon the vacation of a street in a city of the second class, the vacated land reverts to the owners of the adjoining lot in proportion to the frontage of the lots thereon, and becomes a part of such lots and passes under a conveyance in which the lots are described as originally platted.[77] When a road or street is closed many of the reasons for a rule extending the fee of the abutting lots to the center thereof are destroyed, the presumption is largely overcome, and the land in the street in many instances becomes a distinct parcel free from the previous easement. The particular circumstances in any given case, the understanding of the parties at the time of the transaction, and the intention as

[75]Loud v. Brooks, 241 Mich. 452, 217 N. W. 34, overruling Plumer v. Johnston, 63 Mich. 165, 29 N. W. 687 (supra), and citing Paine v. Consumers Forwarding & Storage Co., 71 Fed. 626; Harrison v. Augusta Factory, 73 Ga. 447; Johnson v. Arnold, 91 Ga. 659, 18 S. E. 370; Hamilton v. Chicago, B. & Q. R. Co., 124 Ill. 235, 15 N. E. 854; Stack v. Coffin, 105 Mass. 328; Manchester v. Hodge, 74 N. H. 468, 69 Atl. 527; Miner v. New York, 37 N. Y. Super Ct. 171; Clark v. Providence, 10 R. I. 437; Andrews v. Youmans, 78 Wis. 56, 47 N. W. 304. See also Amerman v. Missouri, K. &c. R. Co. (Tex. Civ. App.), 182 S. W. 54, 55; Trowbridge v. Ehrich, 116 App. Div. 457, 101 N. Y. S. 995; LeMay v. Furtado, 182 Mass. 280, 65 N. E. 395.

[76]Paine v. Consumers Forwarding & Storage Co., 71 Fed. 626.

[77]Rowe v. Bowen 113 Kans. 641. 215 Pac. 1022.

effectively expressed, must govern the construction to be given a deed in any concrete instance. It is therefore extremely important that the intention be clearly set forth in the conveyance.

In the outskirts of New York a certain lot owner, Shaw, became invested in the fee of land in an adjacent street, Fifth Avenue, by virtue of a statute abandoning the same. He later conveyed to his adjoiner, Swain, the lot by a deed in which he expressly included all his right, title and interest in the bed of Fifth Avenue. Swain partially fenced the street off along its former side line, and used the same for a garden in connection with his original lot. Subsequently he sold both lots to Schonleven referring in his grant to the Mt. Eden plat which showed Fifth Avenue adjoining the lots, but limiting the property conveyed to the westerly line of the same. Reference to the plat which showed the street as adjacent clearly extended the grant to the center line of the same. This is overcome by the facts that he clearly limited the grant to the side lines, that both Shaw and Swain had regarded the land of the street as a separate tract, and that the street was abandoned. The court ruled that reference to the map was only for the purpose of location and did not convey any interest in the old bed.[78]

The same principle is established in Empenger v. Fairley[79] where Mary Fairley acquired a portion of the shore front upon the vacation of the outer forty-four (44) feet of a ninety-nine-foot street between her property and the shore of Lake Minnetonka and subsequently conveyed to Josephine Schmeidel her lot and the strip of land lying between the northerly boundary of the narrowed Lake Street and the shore by separate deeds of the same date. Mrs. Schmeidel in her will devised to Mary Fairley "all that cer-

[78]Schonleben v. Swain, 130 App. Div. 521, 115 N. Y. S. 23; Anderson v. Citizens Sav. & Trust Co., 185 Cal. 386, 197 Pac. 113 (infra, note 82).

[79]119 Minn. 186, 137 N. W. 1110.

tain piece of land known as part of Lot Three" and made no mention of the small piece lying in front along the shore and conveyed by separate deed. Mary Fairley sued the executor, Empenger, for the same, and the court held that upon the vacation of a part of the street the land in

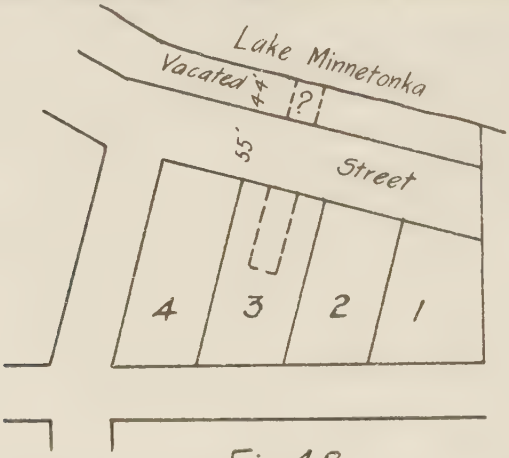

Fig. 48.

the bed of that portion became a distinct parcel and title to the same did not pass with title to a lot bounded by the street. It further noted that Mary Fairley had recognized this in her conveyance to Josephine Schmeidel.

Where a platted street is legally vacated before any lot has been transferred, the land therein is freed of all easements and when a lot abutting thereon is correctly and accurately described by the metes and bounds of the plat, the grant is limited to the lines of the lot, and the street is regarded as a parcel distinct and separate;[80] and where under such circumstances the owner of the plat transferred the fee to the street subject to the easement to one person and afterwards conveyed the adjoining lots to other persons, the implication that he did not intend to grant the latter

[80] White v. Jefferson, 110 Minn. 276, 124 N. W. 373, 125 N. W. 262. 32 L. R. A. (N. S.) 778.

any interest in the land which had been a street is very positive.[81]

A divided court in California recognized the reasonableness of regarding the land in a vacated street as a distinct parcel of land which would not pass with the conveyance of the abutting lots, but ruled that where the conveyance was made by reference to a plat which showed the street as open and not as abandoned, the conditions as existing on the paper plat and not the actual facts were in the minds of the parties and that the intention must have been to extend the fee to the center line.[82] The facts were as follows. In 1887 Griffith laid out the subdivision and sold a lot to Martin, who in 1911 after the street had been abandoned, conveyed Lot One, Block Seven to Lempertz by reference to the original plat. The Trust Company represented the Lempertz children and claimed the fee to the center line of the street. Justice Sloan in dissenting limited the grant to the actual lines of the lot, on the theory that a description by reference to a plat upon which the outlines and dimensions of the tract conveyed are definite, and upon which the lot is pictured as without the street does not convey the fee to the center line of the tract, regardless of the street being opened or vacated.

While the majority opinion is by no means arbitrary, due consideration must be given to the reason for referring to the plat, which may be for locative purposes only. The vacation of a street is a matter of record, and the grantee has constructive notice of the fact at the time of purchase. Under these circumstances it is extremely important that the intention as regards the fee in the land of the abandoned street be clearly expressed.

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[81] White v. Jefferson, 110 Minn. 276, 124 N. W. 373, 125 N. W. 262, 32 L. R. A. (N. S.) 778.

[82] Anderson v. Citizens Sav. & Trust Co., 185 Cal. 386, 197 Pac. 113. See also Schonleben v. Swain, 130 App. Div. 521, 115 N. Y. S. 23.

[§ 247.] (5) **Private Ways.**—In a few jurisdictions it is held that where a proprietor opens a private way through his property there is no presumption that deeds abutting this way give title to the center line thereof,[83] but the weight of authority is to the contrary; and in general the same rule prevails in regard to private ways as in the consideration of highways, that is a deed describing land conveyed as bounded on a way conveys title to center thereof if grantor owns so far.[84] This rule has been held to apply where the distances stated did not extend to the center of the way mentioned as a boundary[85] and is of course subservient to the fundamental principle of interpreting the deed so as to give effect to the intention of the parties. If the boundary is fixed expressly on the side of the way, and the area or distances given exclude the way, fee is not passed,[86] and if a deed conveying land and granting the use of a way refers to the land so conveyed as that acquired by the grantor by a certain deed to which reference is made, and the description of the second deed does not include the way, fee to the center is not passed, for it is thus made apparent that the grantor considers the land conveyed as distinct from that in the way, and grants no fee to the land of the latter, but merely the use of it.[87] A conveyance describing land by metes and bounds so that a private way or lane is not included, and making no call for the way as a boundary, but granting the use of the same, will not pass title to any land except that within the metes and bounds.[88] It will be noted that this case differs radically from a pre-

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[83]Serry v. Waterbury, 82 Conn. 567, 74 Atl. 908; Ames v. Hilton, 70 Maine 36.

[84]Gould v. Wagner, 196 Mass. 270, 82 N. E. 10; Maryland Tel. & T. Co. v. Ruth, 106 Md. 644, 68 Atl. 358, 14 L. R. A. (N. S.) 427; MacCorkle v. Charleston, 105 W. Va. 395, 142 S. E. 841; Pitney v. Huested, 8 App. Div. 105, 40 N. Y. S. 407.

[85]McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076.

[86]Gray v. Kelley 194 Mass. 533, 80 N. E. 651.

[87]Crocker v. Cotting, 166 Mass. 183, 44 N. E. 214.

[88]Mott v. Mott, 68 N. Y. 246. See § 243.

vious citation in which the metes and bounds did not include a private way to which fee passed because it was specifically mentioned as a boundary, and as such was considered as a monument.

On the other hand, the rule giving fee to the center of a private way and easement over all was held to apply when a discrepancy in a call for distance did not carry the land to a private way mentioned as a boundary.[89] This of course is in compliance with the rule that a call for a monument prevails over course and distance.

The control of the intention of the parties, as evidenced in the various conveyances, and the construction placed upon them, is nicely developed in Frost v. Jacobs.[90] The de-

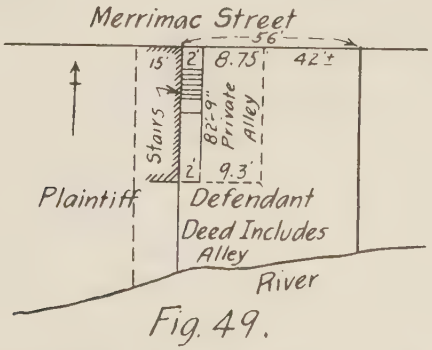

Fig. 49.

fendant had begun to close the alley in question, and the plaintiff who sued to restrain him, claimed fee to the center of the alley, maintaining that it had been acquired by a deed covering the two-foot strip along the east of his property. This was purchased by a predecessor in title, Thompson, to provide for a two-foot outside stairway trespassing in the alley, then owned free of all easement by Tilden. The deed conveyed a strip fronting two (2) feet on Merrimac Street, bounded on the east eighty-two (82) feet nine (9)

[89]Lemay v. Furtado, 182 Mass. 280, 65 N. E. 395.

[90]204 Mass. 1, 90 N. E. 357.

inches by a private way, together with the easement over the latter. Subsequent conveyances described the east line of the plaintiff's property as follows: "thence southerly by private way eighty-two feet nine inches; thence westerly two feet, thence southerly to river," and granted an easement in the private way.

The presumption in the particular jurisdiction would carry the fee passed in the conveyance from Tilden to Thompson to the center of the alley, but it was held otherwise, for the sale was for a part of the passage way itself and the obvious intent of the acquisition was to clear the trespassing. At the same time Thompson obtained an easement in the alley for the purpose of better access to the stairway. The fee in the alley was of value to Tilden, and he might well retain it for the purpose of selling easements to other parties in the rear of his lot. The court held that the plaintiff had no fee whatever in the alley, but an easement which restrained the defendant from closing it.[91]

II. LOCATION OF STREETS.

[§ 248.] **(A) Importance.**—While it is true that stable street lines do not necessarily insure the fixity of the private boundaries within a block, it is axiomatic that the accuracy desired in city surveying cannot be attained where the side lines of the street are not located with precision, for the exterior lines of the blocks are the natural base to which all deed descriptions should be referred and from which all private surveys should be started. "In order to build cities and towns there must *be some finality* as to the location of blocks and streets,"[92] and every resurvey after long intervals of time is not to be accepted as correct, and all the highways affected thereby to be moved to correspond

[91]Frost v. Jacobs, 204 Mass. 1, 90 N. E. 357.

[92]Temple (C) Orena v. Santa Barbara, 91 Cal. 621, 28 Pac. 268.

to the latest conclusion of a civil engineer[93] for "if such were the case, no highway would ever have a fixed or permanent location,"[94] and all lines would be forever subject to be revised and corrected or changed by new surveys not really more accurate, but only for the time deemed so.[95]

These statements do not impeach the skill of the well trained engineer, for their truth rests largely upon the fact, recognized by the courts, that in the infancy of a town or city, streets are not defined, are but portions of land dedicated to public use, as described on some chart or plan of the town, and themselves require to be located or fixed,[96] and to some degree upon careless and incompetent workmanship in laying down the original plat. Water cannot rise higher than its own level, and the precision of a property survey cannot be greater than that of the street line from which it is started.

It is therefore the clear duty of the city authorities to establish and maintain a system of street monuments as a control for property surveys. While the private engineer may by following the rules for the ascertainment of street lines as laid down by the courts, find the true position of the boundaries of an individual lot, his work is of less value because he has been denied the checks afforded by a well monumented system of street lines, and he is of necessity unable to present a plat or description of the land which is mathematically definite. Where the original street lines have been lost, it is the duty of the city engineer to reestablish them with due regard for the rights of the abutters which can be affected by proceedings to reestablish the bounds of a street only "by due course of law" and after opportunity to be heard.[97] It is of the greatest

[93]Merrill v. Hutchins, 180 Iowa 1276, 164 N. W. 184

[94]Merrill v. Hutchins, 180 Iowa 1276, 164 N. W. 184.

[95]Orena v. Santa Barbara, 91 Cal. 621, 28 Pac. 268.

[96]Doe v. Riley, 28 Ala. 164, 65 Am. Dec. 334.

[97]Hartford Trust Co. v. West Hartford, 84 Conn. 646, 81 Atl. 244.

importance that a situation map be prepared, that the owners along the street be advised of the proceedings, and that all formalities prescribed by statute or incorporated in the city charter be followed[98] for otherwise the reestablishment is void.

Decisions of the court fixing the lines of individual properties are but an incomplete solution, and where original monuments are lost, the only satisfactory procedure is to legally re-establish the street as near to its original location as possible. From an engineering standpoint, street lines legally defined, and monumented in agreement with the defining ordinance or plat are the only satisfactory base for a survey.

[§ 249.] (B) Effect of Establishment.—(1) By Statutory Proceedings.—The establishment of a street by statutory proceeding is void where the location is not definite[99] and a description which is vague,[1] or impossible of location is void and renders all the proceedings void.[2] Technical certainty, however, is not necessary, and it is enough if the general description be such that a surveyor can, with the assistance of the points definitely named, trace and designate the proposed route.[3] Thus where a highway was described in the establishment proceedings as along the right of way of a certain railroad company that held its way by prescription or adverse possession and had never fixed its boundaries by agreement with the adjoining land owners, a statute requiring the railroad to fence its right of way along enclosed and improved property raised the presumption that the railroad had complied with the law, and that

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[98]Hartford Trust Co. v. West Hartford, 84 Conn. 646, 81 Atl. 244.

[99]Hinckley v. Hastings, 2 Pick. (19 Mass.) 162.

[1]Sonnek v. Minnesota Lake, 50 Minn. 558, 52 N. W. 961.

[2]Dahlin v. Neslund, 125 Minn. 359, 147 N. W. 240.

[3]Adams v. Harrington, 114 Ind. 66, 14 N. E. 603.

there was a fence which as a monument gave the road location.[4]

Furthermore, although direct ordinance is the more usual and proper form, streets may be established indirectly by reference to them in other ordinances.[5] Thus an ordinance pertaining to the location of a railroad in a certain street mentioned by name, or regarding the construction of a bridge on a named street, established the said street by recognition. Under such circumstances there is little likelihood of the ordinance giving any clue to the location, for action in this regard is indirect. Likewise the acceptance of a plat showing an addition to a city may establish the streets without locating them precisely, for all depends upon the plan and the accuracy of the basic survey. Under these circumstances it is sometimes found that while the plat is definite and accurate, there is no tie to the adjacent territory within the city limits. However highways established by statutory proceedings are usually definitely located, and where location is marked by enduring monuments referred to in the ordinance, reference to the records and official plats gives the engineer authoritative data for the practical location, for the legal line of a street must be determined by the record of the layout and not by the lines of actual use.[6] The width of a street or highway may be given in the proceedings of establishment, but where the statutes prescribe the same, this is not necessary,[7] and where the proceedings do not fix the width it will be taken as the full width as determined by the statutes.[8]

[§ 250.] (2) **By Dedication.**—Dedication, like statutory proceedings, may locate streets with varying degrees

[4]Joliff v. Muncie Elec. Light Co., 181 Ind. 650, 105 N. E. 234.

[5]C. & O. R. Co. v. Dayton, 197 S. W. 969.

[6]Walsh v. Hopkins, 22 R. I. 418, 48 Atl. 390.

[7]Dickson v. Davis County, 201 Iowa 741, 205 N. W. 456.

[8]Taylor v. Austin, 83 Nebr. 581, 119 N. W. 1123.

of certainty. If made by recording of a plat based on a good survey with the streets well monumented on the ground and defined with mathematical completeness on the plat, the task of finding the actual location is simple. However in many jurisdictions inferior plats are accepted for recording, and in a comparatively few years the precise location of the streets is lost. The same may be said in regard to dedication by deed.

[§ 251.] (3) **By Prescription.**—The location of streets acquired by prescription is not likely to be definite. While it is true that the right of easement of common and public highway acquired by prescription is confined to the lines and width of road as actually used during the necessary period,[9] these lines are established by recognition, and are not suitable as a base for extensive surveys.[9a]

[§ 252.] (C) **The Rule.**—Long experience leads to the following precedence of evidence in determining the true location of streets and blocks according to a plat and survey thereof—

(a) Natural monuments.
(b) The lines actually run, and corners actually marked on the ground at the time of making the plat and survey.
(c) The lines of corners of an adjoining lot or block if called for or ascertained.
(d) If no monuments are mentioned, or in existence, evidence of long continued occupation.
(e) If the description is ambiguous or doubtful, parol evidence of the practical construction given by parties, by acts of occupation, recognition of monuments or boundaries.

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[9]District of Columbia v. Robinson, 180 U. S. 92, 100, 45 L. ed. 440, 21 Sup. Ct. 288.

[9a]See § 39, supra.

(f) The courses or distances marked on the plat or survey.[10]

[§ 253.] (D) **Applications.—(1) Control of Street Monuments.—(a) General.**—In McClellan v. Weston[11] Justice McWhorter quoted Mr. Brannon, counsel for the appellee as follows: "The best evidence of the location of true lines are the old buildings, old inclosures, and ancient possessions, but old buildings, old inclosures, and ancient possessions cannot stand as indicating the true line as against a well established monument set up for the true corner and line of street in the plan and layout of the town." Such monuments derive their inherent strength from the fact that they actually mark the street lines on the ground independent of all measurements and show the actual location of the street. Hence they prevail even though there may be some error in their location, for where a highway is laid out according to the stakes and monuments fixed by the original survey, the actual location will govern in case of conflict between the monuments and the field notes.[12]

Thus in Wolpert v. Chicago,[13] adjacent subdivisions were started from an incorrect corner stone and streets laid out accordingly. Later surveys revealed the error and established that a street as laid from the proper stone would include a portion of certain lots in the subdivision. The court held in view of the facts that the owners and surveyors laid out and staked the street on the ground itself at a particular point in accordance with a certain stone (incorrect but of definite and known location), the proper line of the street at such point was as laid out. In this case the stone was an enduring witness indicating the intention of the

[10]Racine v. J. I. Case Plow Co., 56 Wis. 539, 14 N. W. 599; Appeal of Richardson, see § 76, supra.

[11]49 W. Va. 669, 39 S. E. 670, 55 L. R. A. 898.

[12]Brause v. Fayette County, 164 Iowa 606, 146 N. W. 6.

[13]280 Ill. 187, 117 N. E. 447. See § 83, supra.

owners and marking on the ground the limits of the street as dedicated to the public, and the deficiency in land resulting from the error fell upon the street.[13a]

[§ 254.] (b) Necessity of Identification.—A monument marking a street must like all monuments be durable, certain, and capable of identification. Where a street had been recognized for forty years, a survey measured from a corner established by discovering a bottle buried in the ground as described in a deed was held insufficient to change the boundaries of the street.[14] The evidence in this case indicated at least that the beer bottle used as the starting point was not that mentioned in the deed, which gave no clue to the identification revealed by names or markings blown in the glass. The monument lacked certainty and means of identification.

The same point is perhaps better illustrated in the case of Eldora v. Edgington[15] where the dignity of the monument was somewhat greater than that of the beer bottle which might perhaps suggest a confused condition of the engineer. The plat was tied to the government survey, and the resurvey was started from a monument admittedly not established by the government, but pointed out by persons living in the vicinity as the true corner. These persons had never seen the true corner, and their testimony amounted to nothing more than a showing of recognition thereof by certain persons not including Edgington, the owner of the lot, whose boundary on the street was in question. The court held that such survey was not sufficient to overcome the owners showing of location, based on occupancy to the line claimed for forty years and established as the true line by a county surveyor. Thirty years before the controversy the owner had planted trees on the prop-

[13a]See § 77, supra.

[14]Hart v. Independence, 84 Ore. 194, 164 Pac. 719

[15]130 Iowa 151, 106 N. W. 503.

erty in dispute and constructed, at the request of the city, a sidewalk outside a line marked by a fence, and these were regarded as better evidence of true location because of the uncertainty of the basic monument of the recent survey.

[§ 255.] (2) **Control of Lines Run.—(a) General.**— When plat monuments have been lost or destroyed, and none can be found, the curb lines along the streets, having been established by legal authority are the only safe monuments by which engineers and surveyors can be guided, and where the custom of using them as the only available monuments has been adopted, good faith measurements made from them by disinterested surveyors will not be held invalid.[16] The strength of this presumption depends upon the establishment of the curb lines by competent engineers with due regard to the monuments before they were lost. Surveys made by public officers having the appearance of regularity are prima facie correct, as such officers are presumed to understand their duties and to have performed them.[17] Surely curb lines and sidewalk lines established under the supervision of a city engineer are more likely to be correct than fence lines whose determination is not necessarily according to a survey. Nevertheless, as pointed out by Referee Cuddeback in Hastings v. McDonough,[18] there is no rule of law that makes the center line of the pavement the center line of the street in which it is laid. It is merely strong evidence of where the city authorities regarded the correct location of the street, but if shown in error must yield.

[§ 256.] (b) **Effect of Conflict Between Monuments and Improved Street.**—Even where there is no positive evidence that the sidewalks were established by the city en-

[16]Jacobs v. Goodrich, 90 Nebr. 478, 134 N. W. 171.

[17]Baeder v. Jennings, 40 Fed. 199.

[18]13 App. Div. 625, 43 N. Y. S. 628, 629.

gineer, they may prevail over plat angles and dimensions. It is a well established rule that a highway mentioned in a deed as a boundary must be understood to mean the highway as it practically exists, the apparent and travelled highway, and not the highway as it exists of record merely.[19] In Smith v. Stacey,[20] this rule was applied to a city street. The visible location as evidenced by sidewalks and trees had never conformed to the plat, and differed by an offset of thirteen feet in sixty. It was held that a fence located with reference to the visible street marked the true boundary. There was no question regarding the street line as laid down in strict compliance with the plat. It could readily be located by turning an angle, but was not parallel to the sidewalk lines as actually constructed and which had been regarded as evidence of the practical location of the street for years. The center line depended upon a plat dimension and existed on paper only. The sidewalks were actual and visible, and hence prevailed.

There is much logic in recognizing that the street as actually laid out and developed fixes the location of the side lines, and where parties at the time of the transaction have used sidewalk lines as the basis of the survey, their footsteps must be followed in relocating the grant. Nevertheless the legal line of a street must be determined by the record of the layout, and not by the line of the street as actually used.[21] In all construction work slight inconsequential errors are bound to creep in, and to utilize a side line as determined by "splitting" curbs or sidewalks to support a location at slight variance with that as fixed by monuments or by simple direct measurements from monuments is basing the control upon a technicality and misapplying a sound principle. When the discrepancy is large, then the ques-

[19]Falls Village Water Power Co. v. Tibbetts, 31 Conn. 165; Muir v. Palmater, 125 Misc. 793, 211 N. Y. S. 710.

[20]68 App. Div. 521, 73 N. Y. S. 1022.

[21]Walsh v. Hopkins, 22 R. I. 418, 48 Atl. 390.

tion as to what lines have been established by recognition enters the problem, and the location hinges upon the facts of the particular case. It is proper to reestablish a monument by measuring from an object which has been located with regard to the lost monument and a known distance therefrom,[22] and where street monuments are gone, it is the duty of the city authorities to direct their engineer to reestablish the lost stones from the lines of the street improvements and private monuments set to mark the street lines.[22a]

[§ 257.] **(c) Private Improvements.**—Other improvements such as fences or buildings set by owners on the line of the street according to stakes established by surveyors soon after the original survey was made, and maintained for a long period of years are competent evidence to prove the location of a street.[23] Thus in Leland v. Bourne,[24] two ancient fences in harmony with the deed dimensions and in agreement with the lines of the blocks to the north and south of the one in question prevailed over monuments which had been used for private surveys for over twenty years. The original field notes and plat were no longer in existence, and there was no evidence that the monuments were stones of the original survey. Furthermore the official city plat established that the block to the south had been shifted some three feet to the west without making a corresponding change in the monuments. These facts all indicated that the fences were better evidence of the actual location of the street and block in question than the unidentified monuments, recognition of which would create conflict within the block and throw its lines out of harmony with those on adjacent blocks. The weight to be given to private or to public improvements is entirely dependent

[22] Williamson v. Gooch, 103 Maine 402, 69 Atl. 691.

[22a] See § 122.

[23] Racine v. Emerson, 85 Wis. 80, 55 N. W. 177, 39 Am. St. 819.

[24] 41 Utah 125, 125 Pac. 652.

upon the probability of their correct location with regard to the original location. The presumption of agreement is strong, especially in the older cities, but may be overcome

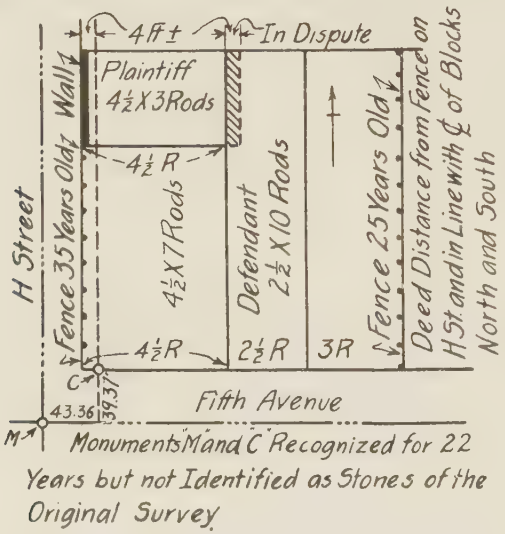

Fig. 50.

by evidence to the contrary.[25] Where the evidence established that certain identified trees marked the line of an ancient fence which had served for more than twenty-four years as a boundary of a public road, the same controlled the location[26] but in the absence of evidence it can not be assumed that trees are planted on street lines in cities and towns as common observation indicates to the contrary.[27]

[§ 258.] (3) **Control of Lines in Adjacent Blocks.**—In ascertaining the true location of streets, the original monuments of which can not be found and identified, the lines and corners of adjoining streets and blocks, and the

[25]See Racine v. J. I. Case Plow Co., 56 Wis. 539, 14 N. W. 599; § 252, supra.

[26]Newburg v. Kienle, 60 Ore. 486, 120 Pac. 3.

[27]Harris v. Lewis, 156 Iowa 413, 136 N. W. 674.

location and occupancy of lots thereon and therein, as indicated by old fences, old buildings, the streets as laid out and used for many years, and stakes and monuments established by former surveys are competent to prove the actual location.[28] The courts are inclined to regard the establishment of a line by improvements in immediate blocks on the same street superior to one from a recognized monument some distance off, and dependent upon courses and distances taken from a plat. The initial point and base line of a survey are not necessarily more controlling than other ascertained points and the weight to be given them is dependent upon such circumstances as proximity and relation to the point to be located. In the case of Orena v. Santa Barbara,[29] where all but one of the original monuments were lost, the surveyor for the city had located the street in dispute from the known monument on a parallel street several blocks away by distances adjusted to provide for the discrepancies of the original survey. It was held by the court that measurements on the street in dispute were naturally of more value than elsewhere, and if they or places where they had been could not be located, it would be important to ascertain the boundaries of the street as actually opened and used, and if such location had been generally acquiesced in by the public, by lot owners, and by the municipality, in the absence of more certain evidence it would be conclusive. The logic of this ruling is made apparent in Hellman v. Los Angeles,[30] in which the above case is cited. The accuracy of the survey establishing the street was not questioned, but the plat upon which the survey rested was based upon a notoriously inaccurate survey. Hence the evidence was incompetent to show where the street was located under the inaccurate survey,

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[28]Madison v. Mayers, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635.

[29]91 Cal. 621, 28 Pac. 268. See § 144, supra.

[30]125 Cal. 383, 58 Pac. 10.

and the artificial monuments in adjacent blocks of the same street were regarded as more certain and reliable.

In Brader v. Carthage,[31] a street line as established from the block to the north prevailed over a recently located line in the same block, which in its width from east to west contained a surplus foot and a half. Brader when constructing his sidewalk placed the excess in the block and thus located the walk a foot and six inches to the west of his neighbor on the south. The city contended for the line as recognized by the latter. In support of Brader's location were the facts that his sidewalk was in line with that in the block to the north, that its location made Lyon Street in front of his property the same width as in the adjacent block, and that the official plat showed no offset or jog. The court supported Brader's contention on the ground that a plat is to be interpreted by its outlines as well as by its dimensions and notes.

[§ 259.] (4) Control of Lines of Continued Occupancy. —Where the boundaries of a street have not been actually located by monuments, and abutting land owners have marked the same for a long period by permanent improvements, the public is estopped to assert a claim to the street beyond the boundaries as established. In New Castle v. Hunt,[32] the original monuments were lost so that no accurate survey was possible. When the property whose street line was in question had been improved some seventy-five years previous, a hedge fence and house costing $4000 were erected presumably on line. Twice the city engineer had established the street lines in conformity with these improvements. In deciding the issue the court recognized that the title to land in streets and alleys can not be acquired by adverse possession,[33] but held that the

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[31](Mo.), 256 S. W. 548.
[32]47 Ind. App. 249, 93 N. E. 173.
[33]See § 374, infra.

ancient improvements were monuments witnessing the actual location.

This theory is not to be applied to overcome the principle that the legal line of a street must be determined by the record of the layout,[34] and is to be applied only when widespread and large discrepancies suggest errors in the original survey and plat, or render doubtful the identity of the monuments used. Where surveys are dependent upon private improvements, precision is unattainable, and while recognition of the principle that where superior evidence is not available, lines of long recognition control, may locate an individual property with the desired precision, it does not satisfactorily locate the street line for purposes of other surveys.

[§ 260.] (5) **Control of Recognized Lines.**—According to the Pennsylvania law the viewers in laying out and returning a road, survey and mark upon the ground and describe in their report the starting point and middle line only. The breadth is fixed by the court in the order of confirmation. In the case of Athens v. Carmen,[35] the court records located the center line properly, but the width was given in the reports of viewers as thirty-three (33) feet, and in the order of confirmation as thirty (30) feet. With the assent of all the parties interested, evidence of the width as established by fifty years use was held admissible, and the legally irregular breadth of thirty-three (33) feet thus sustained. Under these conditions the street is to all surveying purposes established by prescription, and of necessity lacks precise location until defined by statute and monumented in accord therewith. In Koenigs v. Jung,[36] it is pointed out that the only reasonable presumption is to assume that the early settlers built to the street lines as

[34]See § 249, supra.
[35]169 Pa. 426, 32 Atl. 422.
[36]73 Wis. 178, 40 N. W. 801.

fixed by the original stakes and that, as time goes on, and expensive and permanent buildings are constructed, long usage, prescription, antiquity, and reputation may be the only means of determining the true boundaries.

[§ 261.] (6) **Control of Maps.—(a) Evidence of Location.**—The maps and records of a city are not the best evidence of the actual location of city streets on the ground, but serve only as guides to such locations. Field notes do not locate lines on the ground, but serve only to furnish data by which surveyors can locate them.[37] These rulings explain the low rank given to maps and plats. They record the location of streets and lines in definite and concise form, but do not actually mark them on the ground. They are liable to error in construction as is exemplified in the case of Sterling v. Pearson.[38] The village authorities in lieu of an original map introduced in evidence a copy showing the alley in litigation, noticeably in error regarding the width of lots within the block. Furthermore an alley was shown in an adjacent block where as a matter of fact none existed. Resurveys based upon plats may therefore be misleading.

[§ 262.] (b) **Evidence of Intention.**—Maps are useful as evidence of the intention of parties in dedicating streets. In the case of John A. Stees Co. v. Reinhardt,[39] the buildings on a business street had been set back five (5) feet from the side line as established from the plat dimensions and the intervening space had been paved at the expense of the owner whose acts and conduct in no wise implied dedication. The city had expended no money upon the strip and there had been no acceptance of an easement beyond the plat line. The court held there could be no public

[37]International &c. R. Co. v. Morin, 53 Tex. Civ. App. 531, 116 S. W. 656.

[38]25 Nebr. 684, 41 N. W. 653.

[39]142 Minn. 340, 172 N. W. 219. To the contrary, Dallenback v. Burnham, 248 Ill. 468, 94 N. E. 41.

easement claimed by statutory use for that required both travel over and work upon for six years; no easement by prescription for the owner had always asserted the right to use the strip in question, and that the plat showed the intention of the owners to retain title thereto.

In the case of Hamlin v. Norwich,[40] the adjacent property owners along a street recognized the street line as delineated on the plat and Hamlin alone claimed beyond it. As adverse possession does not operate to give private owners the land in the bed of the street[41] Hamlin's claim rested upon showing that the ground in controversy was never a part of the street, and this was supported by the fact that the public had never made actual use of it. The city's claim was based upon a plat made by the arbitrators in a partition suit which included the contested land within the street lines, and therefore the fact that no use had been made of it was of no consequence. Although the arbitrators had no right to dedicate the streets, the heirs in accepting the property according to the plan did so, and they and their successors in title were bound by the lines of the streets as shown on the plat.

[§ 263.] (c) **Map as a Monument.**—In Zuleger v. Zeh,[42] the court ruled that where no monuments contradicting the plat dimensions are found, and no substantial reason to establish the inaccuracy of the plat is shown, a survey in compliance with its data must control. The north line of the block in question was given on the plat as fourteen (14) feet longer than its southern, and an engineer in establishing the east line of the street along the western side of the block had made the north and south sides of equal length although there was no monument called for on the plat or existing on the ground to give him any authority for so doing. It is true that a plat is subject to

[40]40 Conn. 13.

[41]See § 347, infra.

[42]160 Wis. 600, 150 N. W. 406.

the same rules of construction as are other instruments, that inconsistencies will be harmonized by eliminating features of lower rank in evidence and giving effect to those of higher dignity,[43] but in the given case there was no call to contradict the plat, and the surveyor of necessity had to follow it.

It is well to note that a map is a record, pictorial in form and liable to error, and of primary value for confirming a given survey. If, as in Bailey v. Hipple,[44] a survey from a certain base lays down the street and property lines in conformity with a plat, the latter is valuable as evidence of the correctness of this survey over another from a different base. In general, wherever the engineer finds monuments and corners where called for in the plat, any isolated cases of encroachments may be attacked with assurance, for the plat has confirmed the identity of the monuments, and the control is transferred to these, which are the best evidence of the original location. On the other hand, if the plat is followed, no monuments are found, and the location of the streets as laid down is in conflict with old improvements, caution should be exercised in giving the plat location control. In a survey without original monuments and stakes, and where it is not known that ancient fences and structures were built with reference to the original lines, slight weight can be given to any structures as evidence of true lines,[45] and an entire community can not be disturbed for the purpose of attaining mathematical precision and conformity to a plan.[46]

[§ 264.] (d) **Map Yields to Actual Location.**—Mere platting does not make a street, even if it is platted on a

[43]Mahaffey v. Miller, 159 La. 610, 105 So. 731.

[44]95 Kans. 515 148 Pac. 606 (§ 123, supra).

[45]Milwaukee Boiler Co. v. Wadhams Oil &c. Co., 126 Wis. 32, 105 N. W. 312.

[46]Orena v. Santa Barbara, 91 Cal. 621, 28 Pac. 268.

city map,[47] and where a public street, fenced and laid out is mentioned in a deed as the boundary of a tract of land, it means the street as actually laid out and fenced, and not as appears on a map filed by public officers showing their intention to change its width, for before the street can be regarded as increased in width, it is essential that the proper legal proceedings necessary shall have been completed.[48] Private property can not be taken away from owners by the mere adoption of a plat without further proceedings for the determination and award of proper compensation. In the case of Washington v. Steiner,[49] the council had adopted a plan upon which the streets were represented. Steiner was about to build on the site of a house which had been standing for fifty to one hundred years, and probably before the incorporation of the borough. The borough instituted proceedings to force Steiner to rebuild on the street line claimed by them which took several feet off the front of his lot as marked by the old building. The borough's claim was based primarily on the plan as adopted by them. The court held the mere resolution of the borough council adopting the plan would not have the effect of widening or narrowing the streets where existing lines do not conform to those laid down on the plat. The accomplishment of this object required legislative action, and although in the form of a resolution the essentials to the validity of an ordinance must be observed. Such a resolution without more would not cast upon one whose dwelling had stood in the same place for years before its adoption the burden of proving that when it was built it was not in the street.

In the case of Watkins v. Welch Grape Juice Co.,[50] the

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[47]Philadelphia v. Hinkle, 64 Pa. Super Ct. 495.

[48]Singer v. New York, 47 App. Div. 42, 62 N. Y. S. 347. See § 268, infra.

[49]25 Pa. Super. Ct. 392.

[50]96 App. Div. 114, 89 N. Y. S. 47.

contention of the village authorities was even more arbitrary. The mere promulgation of an ordinance widening to sixty-six (66) feet, a three-rod highway which predated the incorporation of the village and the filing of a map locating the same were held ineffectual to appropriate the adjoining property necessary to widen the street, no proceedings having been made for the determination and award of compensation to the owners.

Ancient plats of towns which have developed into cities may present very difficult problems. These may check perfectly and reveal evidence of careful preparation, but not conform with the lines as established by old improvements. The discrepancy is readily explained by the fact that in the infancy of the town the exact location of the street line was of little consequence, and no attempt was made to establish improvements in strict conformity with the plan. This is clearly a situation where rigid application of the principle that the statute of limitations can not operate against the rights of corporations representing the public would result in injustice and injury to the abutting lot owners, and where the principle of estoppel should be applied to prevent the city from claiming beyond the lines of actual practical location.[51]

The logic of this is upheld in the case of Washington Female Seminary v. Borough of Washington where a plan made one hundred years previous at the establishment of the borough and assumed for the purpose of the proceeding to be the original, did not control the location of streets as established upon the ground long prior to the recollection of living witnesses and called for in ancient deeds as boundaries.[52] Where this situation exists, deed descriptions must necessarily be vague, boundaries will depend primarily upon

[51]Montevallo v. Village School District, 268 Mo. 217, 186 S. W. 1078.

[52]Washington Female Seminary v. Washington, 18 Pa. Super. Ct. 555.

improvements which most likely conflict with one another, and the skilled engineer is without a foundation upon which to base a precise survey.

[§ 265.] **(e) Effect of Street Existing on Map Only.**—If at the time of conveyance a street has no existence except on a plat, the map of necessity is controlling. Upper Fourth Avenue, New York City, was originally one hundred (100) feet wide, but later increased by a second ordinance to one hundred and forty (140) feet. Litigation arose prior to the actual establishment of the street upon the ground in connection with a conveyance subsequent to the widening. It was held that Fourth Avenue was one hundred and forty (140) feet wide, for its only existence was on the map.[53] Furthermore where the conveyance involves a street which has no actual location, it is evident that the parties must have bargained with reference to the situation as shown upon a map.[54]

[§ 266.] **(f) Effect of Time Element.**—Where a plat dedicating the land in the streets to the public has been subsequently changed with due regard to necessary formalities so that the street widths are increased, proper regard must be given to the relative dates of the change, and of the original conveyances of lots abutting upon the altered streets. This is illustrated in Syracuse where Salina Street was originally laid out as seventy (70) feet wide, but increased to ninety-nine (99) feet in 1841. The city plat showed it uniformly ninety-nine (99) feet wide, but the court held that where the original deed predated 1841, the street was limited to seventy feet unless the owner saw fit to make a dedication of the twenty-nine feet in litigation,[55] but where the original grant was subsequent to the widening

[53]In re Fourth Avenue, 11 Abb. Prac. (N. Y.) 189.

[54]See Reid v. Klein, 138 Ind. 484, 37 N. E. 967; § 101, supra.

[55]Syracuse v. Cook, 187 App. Div. 578, 176 N. Y. S. 396.

the lots involved were unquestionably bounded by the ninety-nine-foot street.[56]

III. RELATION BETWEEN STREET AND PRIVATE BOUNDARIES.

[§ 267.] (A) Private Boundaries Determined by Street as of Date of Deed.—As the aim of all rules of construction is to give stability and permanence to boundary lines, it is evident that changes in street lines can not affect private boundaries dependent thereon by deed measurements. In general where grants give measurements from street lines, these measurements are to be interpreted as being taken from the street line as of date of deed.[57] This rule should never be utilized to move a line, and in its application extreme care should be taken to ascertain whether or not the parties to the transaction were aware of the changed location of the street at the time of writing the description. Unfortunately surveys are often omitted or made perfunctorily when land is transferred, and such matters as changes in street location are not carefully checked. In no case should the rule be applied to overcome the intention of the parties, and where the circumstances clearly indicate that the deed description refers to a prior location, the rule has no force. Thus in Folkman v. Meyers,[58] the strict application of the rule would have upset the entire block; and a stable survey fixing the boundary lines in their original position could only be made by reference to prior deeds in the chain of title.

In 1869 the Camden and Atlantic Land Company conveyed to the Seaview Hotel Company the lot on the south-

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[56]Syracuse v. Cooney, 228 N. Y. 530, 126 N. E. 902; Syracuse v. Philibosian, 190 N. Y. S. 330. See also § 264, supra.

[57]Tebbets v. Estes, 52 Maine 566; Stearns v. Rice, 14 Pick. (31 Mass.) 411; Glover v. Shields, 32 Barb. (N. Y.) 374. See also Syracuse v. Cook, 187 App. Div. 578, 176 N. Y. S. 396 (§§ 66, 266, supra).

[58]93 N. J. Eq. 268, 115 Atl. 615.

east corner of Missouri and Pacific Avenues, and in 1877 conveyed the lot immediately to the east to J. H. Leedown, calling for it as adjacent to the corner lot, and the second to the east to D. Doyle. The latter conveyance called for its beginning point as one hundred (100) feet east of the southeast corner of Missouri and Pacific Avenues. In 1884 an error in the plat was discovered, and the east line of Missouri Avenue was moved five (5) feet to the west. In

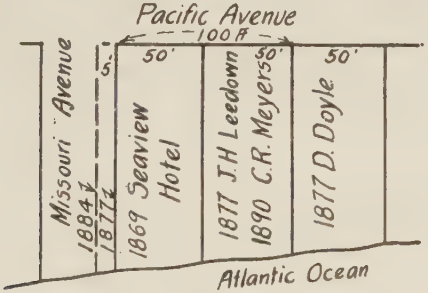

Fig. 51.

1890 C. R. Meyers acquired the Leedown lot by deed which located it as abutting Doyle and in 1921 at time of suit attempted to establish his boundaries by reference to the east line of Missouri Avenue as of the date of his deed. The court held that the change in location of the line of an avenue did not change the boundary lines of land conveyed by prior deeds referring to the line of the avenue as it then existed and hence the boundary of land conveyed by a subsequent deed of part of the land conveyed by former deeds must be located according to line of the avenue as it existed before the change.

[§ 268.] **(B) Effect of Reestablishment of Street.**—In the older cities and towns where the streets were never definitely monumented, or if marked the stones have become lost, it is necessary to reestablish the street lines. This is accomplished by making a situation survey showing

the fences, buildings and other improvements which indicate the probable lines of the original locations. This will invariably disclose slight irregularities and will enable the engineer to establish what are essentially the original side lines, the proper distance apart and straight for a reasonable distance of several blocks or more. It is essential that wherever these lines include within the street any land claimed by an abutting property that this be acquired by due process of law. All owners whose property is affected must be notified, and when the street lines include private land within their limits either the fee or an easement in such land must be acquired by dedication or condemnation.[59]

If in the reestablishment of a street all due formalities of the law have been observed, the lines as reestablished become the lines of the block and control the front lines of the lots. The reestablishment in no wise affects the side and rear lot lines, and due regard should be given to this, where the original deed description predates the reestablishment. While the streets as reestablished should be utilized in new work and old boundaries stabilized by referencing them to the new lines, the legally reestablished street line should not be applied to overcome ancient boundaries in agreement with acknowledged lines of the original survey, but in slight conflict with the legally defined street.

A typical situation arising under these conditions is found in Goldsmith v. Fillman,[60] where the use of dimensions taken from a plat in referencing a boundary to a street resulted in a conflict between the location as determined by surveys from the legally reestablished street and from an original monument of the block as identified by the plat. In 1864 Reitmeyer made a subdivision as shown in the sketch and in deeding out made it a practice to convey by lot numbers followed by a description by course and

[59]See §§ 248 and 264, supra.

[60]33 Pa. Super. Ct. 44.

distance. His first sale from the subdivision was in 1865 to Isaac Fillman, in which he conveyed Lots One, Two, Three, Four, Five, "Bounded, limited and described as follows: Beginning at the southeast (northeast?) corner of

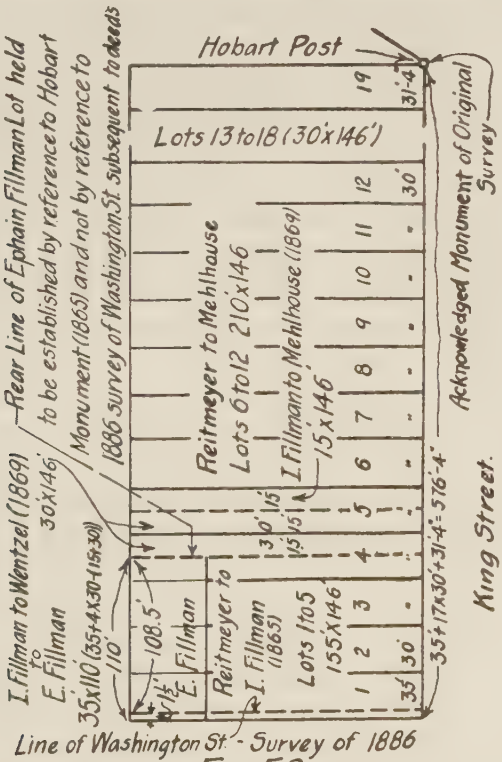
Hobart Post
Lots 13 to 18 (30'x146')
Rear Line of Ephain Fillman Lot held to be established by reference to Hobart Monument (1865) and not by reference to 1886 survey of Washington St. subsequent to deeds
I. Fillman to Wentzel (1869) 30'x146'
E. Fillman to I. Fillman 35'x110' (35'+4'+30'+15'+30') 110'
108.5'
4½'
E. Fillman
Reitmeyer to I. Fillman (1865) Lots 1 to 5 155'x146'
Reitmeyer to Mehlhause Lots 6 to 12 210'x146'
I. Fillman to Mehlhouse (1869) 15'x146'
30'
15'
15'
15'
1 2 3 4 5 6 7 8 9 10 11 12 19
35' 30' - - - - - - - - - 30' 31'-4"
35'+17'+30'+31'-4"= 516'-4"
Acknowledged Monument of Original Survey
King Street.
Line of Washington St. - Survey of 1886

Fig. 52.

Washington and King St., thence northwardly along south (east?) side of Washington Street one hundred and forty-six (146) feet to a twenty-foot wide alley, thence eastwardly along said alley one hundred and fifty-five (155) feet to a stake, a corner of Lot Six in plan of lots laid out, etc.,—thence southwardly along the line of said lot one hundred and forty-six (146) feet to King Street, aforesaid, thence westwardly one hundred and fifty-five (155) feet to place

of beginning." Three years later Reitmeyer conveyed to Mehlhouse "seven lots, Six, Seven, Eight, Nine, Ten, Eleven, and Twelve in plan of lots surveyed, etc.,—bounded and limited as follows: Beginning at a stake, a corner of Lot Five, thence northwesterly along line of the same to a twenty-foot wide alley, thence eastwardly along same two hundred and ten (210) feet to a stake in corner of Lot Thirteen, thence southwardly along line of Lot Thirteen, etc., etc." In 1869 Fillman conveyed to Mehlhouse as follows: "Beginning at a stake, a corner of Lot Six, belonging to Henry Mehlhouse, thence westwardly along King Street fifteen (15) feet to a stake; thence northwardly one hundred and forty-six (146) feet to a twenty-foot wide alley; thence easterly along said alley fifteen (15) feet to a stake a corner of Lot Six; thence southwardly along said lot one hundred and forty-six (146) feet to a stake the place of beginning, being one-half of Lot Five."

The same year and month Isaac Fillman conveyed to Wentzel thirty (30) feet west of the above with no call for abutters. This reduced his frontage on King Street to one hundred and ten (110) feet, and he then conveyed to Ephain Fillman a lot thirty-five (35) feet on Washington Street and of uniform width for a depth of one hundred and ten (110) feet. This passed to Hannah Fillman, the defendant, who had a survey made and attempted to move the rear line back a foot and one-half so as to give a depth of one hundred and ten feet from the east line of Washington Street as established by the city in 1886. Goldsmith who had acquired the Wentzel lot objected to this. It is to be noted that the post in the Hobart line remained as an acknowledged monument, and that if the plat is correct the position of Washington Street as it was in 1865 is 576′-4″ from this post.

The first ruling of interest is that the court held that Reitmeyer's practice of conveying the lots by number re-

ferring to a plan and then describing them by course and distance calling for lines of abutters, gave the plat control over course and distance, and that therefore the staked line between Lots Five and Six was the boundary between Isaac Fillman and Mehlhouse regardless of dimensions. The court assumed that in 1865 when these transactions took place the stakes of the survey were in place and known. It was further held that the deed from Isaac Fillman to Mehlhouse called for the line between Lots Five and Six and deeded a fifteen-foot strip to the west thereof not calling for any abutter on the west. In the decision no cognizance is taken of the clause "being one half of Lot Five." Had actual original stakes established Lot Five as more or less than thirty feet frontage, regard for this clause would control the dimension of fifteen (15) feet, for otherwise there would be an obvious inconsistency. The deed to Wentzel was for a plot 30x146 without qualification. According to these rulings Isaac Fillman had left not necessarily one hundred and ten (110) feet on King Street but whatever remained after forty-five feet had been taken from the distance from Washington Street to the original boundaries of Lots Five and Six.

The court further held that in ascertaining the location of an interior line in a block of lots, the same rule holds that is applicable in locating an interior tract of land in a block survey. "The marks of a block consist of the marks, if any such are found, of every tract in the block." The line between Lots Five and Six was then established from the lines of the other lots in the plan, especially the old post in the Hobart line, and this left in Isaac Fillman 108.5 feet on King Street from the line of Washington Street as defined by the city in 1886. Therefore the Fillman lot had a depth of but 108.5 feet as measured from the legally established line of Washington Street and this depth as determined by a survey from the recognized monuments

of the plat prevailed over the conflicting deed call for one hundred and ten (110) feet.

One very important element entering into this decision is the date of the legal establishment of Washington Street, for in the infancy of towns, streets themselves are merely undefined portions of land set aside for public use, and themselves need to be located.[61] Therefore there is no assurance that the established street of 1886 is coincident with the street of the plat of 1864, and unquestionably the old landmarks conforming to the plat are the best evidence of the original boundaries. Where streets are reestablished and the side lines are changed in position, only properties abutting the street are affected, and the interior lines of the block are to be located with regard to the original position of the street or from acknowledged monuments within the block.

[§ 269.] (C) Side and Rear Lot Lines Fixed by Interior Lines of the Block.—In Campbell v. Schorr,[62] the north line of Third Street adjacent to Campbell's lot at the northeast corner of Third and Main Streets had been moved four feet to the south when the street was improved. Controversy arose regarding Campbell's north boundary which was Schorr's south line. Schorr's deed gave the width of his lot as forty-eight (48) feet, and an established and recognized fence in harmony with the deed dimensions of Needles, the owner of the remaining lot on Main Street fixed Schorr's north line. The court held that the proper location of Schorr's south line was forty-eight (48) feet from the acknowledged fence along the Needles lot regardless of the location of Third Street and the deed dimensions of the Campbell lot.

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[61]See § 248, supra.

[62]Rowland v. Campbell, 224 Ky. 1, 5 S. W. (2d) 278.

[§ 270.] (D) Effect of Call for Quantity.—(1) Satisfied by Center Line.—Where the quantity called for can be obtained only by measuring to the center lines of the adjacent streets, the measurement must be made from that line. In Cochran v. Smith,[63] the plaintiff attempted to move the eastern boundary of a lot situated on a southeast corner by taking the deed measurements from the exterior lines of the street. The entire parcel covering the land of both parties in the action was originally owned by Sarah Smith, mother of the defendant. In 1883 she conveyed

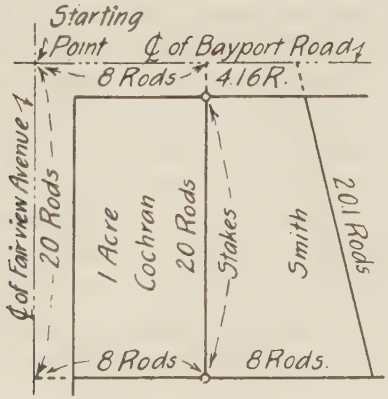

Fig. 53.

to Oliver Smith the eastern portion of the lot describing it by metes and bounds, and establishing stakes at the corners. In 1885 the plaintiff Cochran purchased the corner lot described in the conveyance as "commencing at the northwest corner of the land conveyed, at the junction of Fairview avenue and the main road running through Bayport; thence running southerly by Fairview avenue, twenty rods; thence running easterly eight rods to lands of Oliver C. Smith, thence running northerly, by lands of Oliver C. Smith, twenty rods, to the main road running through

[63] 73 Hun 597, 26 N. Y. S. 103, 56 N. Y. St. 227.

Bayport; thence running westerly, by last-mentioned road, eight rods, to the place of beginning,—containing just one acre of land." When possession was taken the stakes on the Smith line were pointed out; and later in 1890 a survey was made starting from the center lines of the streets and checking the stakes on the eastern line. The action was started in 1893. Surveys showed that starting at the intersection of the center lines and taking the first and last courses along the same, the area was exactly one (1) acre, and the court held that this was the proper procedure and established the eastern line correctly.[64] Likewise where the beginning point is called for on the center line, the area must be made therefrom. This ruling was sustained in Henderson v. Hatterman[65] where the wording of the conveyance gave area control over courses and distances. The deed conveyed the land as commencing at the southwest corner of Lot Nine and running northeast along Indian Boundary Line four (4) chains thirty-three (33) links, thence running north 108.66 feet, thence west 232.98 feet, thence south 265.88 feet to place of beginning, meaning and intending to convey one (1) acre of land without reference to metes and bounds as above described.

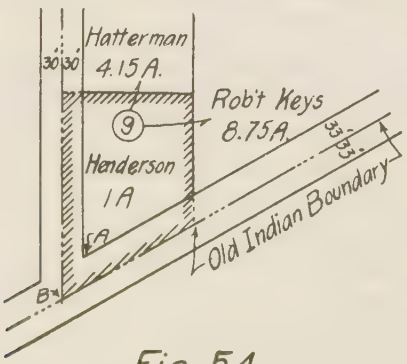

Fig. 54.

[64]Cochran v. Smith, 73 Hun 597, 26 N. Y. S. 103, 56 N. Y. St. 227.

[65]146 Ill. 555, 34 N. E. 1041.

This was one of three pieces conveyed out of Lot Nine, and ultimately was acquired by Henderson who in establishing his north line insisted upon taking the point A (the intersection of the exterior lines of the streets) as the point of beginning and claiming one acre exclusive of the land in the adjacent streets to which he claimed fee. This contention was not unreasonable for the point of beginning was at the "southwest corner of Lot Nine." The element of confusion arises in the next call "running northeast along Indian Boundary Line," a line which had long been recognized, and was in fact the center line of the road. Therefore if the starting point was taken as the corner of the lot, the boundary had to jump an uncalled thirty-three feet to reach the Indian Boundary Line, and furthermore if the starting point A was taken, four (4) chains thirty-three (33) links would carry the east line over on Keys.

The first difficulty was eliminated by the court holding that the starting point was according to the deed "in the Indian Boundary Line" and therefore must have been intended to be "B" the intersection of the two center lines. The clause giving the area control over course and distance was regarded by ruling that with these center lines as fixed sides the area was to be laid off so as to give one acre entirely west of Robert Key's west line, and including one-half of each of the adjoining streets.

[§ 271.] (2) Satisfied by Side Lines.—However, where the required quantity can be obtained from the side lines, and such is clearly the intention, the grantee takes from the side lines with fee in the roadway. In Fraser v. Ott,[66] where the plaintiff in action was deeded a tract "being the north two acres of Block No. Thirteen of the W. Company's four-acre blocks in the town of Santa Ana East, in the County of Orange, as per map of said Santa Ana East re-

[66] 95 Cal. 661, 30 Pac. 793.

corded in Book—together with twenty-foot right of way across east end of south half of said block." The defendant Ott later bought all the unsold land in the addition including the south half of Block Thirteen. The conveyance was worded in general terms so that he received whatever remained after Fraser's two acres were taken out, and Ott established the north line so that one-half of the street to the west was included in the area. An investigation revealed that the plat was laid off in four-acre blocks exclusive of the sixty-foot streets, and that Block Thirteen was no exception; its area, taken from side lines of streets being 4.04 acres. It was therefore logical for the court to hold that Fraser was to have two acres, neat measure, taken from the side line and fee to one-half of the street. It is interesting to note that the latter is not mentioned in the description except by reference to a recorded plat.

IV. REVERSION.

[§ 272.] **(A) The Rule.**—Where land is bounded upon a highway or street without reservation, and thereafter the highway or street is vacated, the land in the bed of the same reverts to the grantees holding the abutting lots[67] and if the street runs along the margin of grantor's land, and he owned the fee in the entire width, the same inures to his grantees owning the adjoining lots;[68] but where conveyance limits the grant to the side lines of the street, no fee in the way has passed to the grantees holding the abutting lots, and they acquire no interest in the bed when the street is vacated, and the land therein relieved of the public easement;[69] and where the original grantor restricts the conveyance by words so as to reserve title to the land within

[67]Town of Hoxie v. Gibson, 150 Ark. 432, 234 S. W. 490; Brown v. Oregon Short Line R. Co., 36 Utah 257, 102 Pac. 740.

[68]Healey v. Babbitt, 14 R. I. 533.

[69]Groff v. Philadelphia, 150 Pa. 594, 24 Atl. 1048.

the street in himself, the fee upon vacation reverts to him free from the burden of easement.[70]

[§ 273.] **(B) Effect of Manner of Establishment.**—No complications arise where the rule is applied to vacated streets in which the public enjoys only an easement, but where the city has acquired the fee in the bed of the street by condemnation proceedings or a statutory dedication the situation is not so simple. When the title to the land in a street is in the municipal corporation, the fee upon vacation remains in the city,[71] which may deed the property.[72] The logic of this is apparent for the fee of the land in the street has been separated from and does not pass with the title to the lot, and the abutting land owner's interest in the street is limited to an easement of access, light and air.

However, there are many advantages in having the fee in vacated streets revert to the holders of abutting properties, and in Illinois a certain vacation ordinance specifically empowered the city to "convey by quitclaim deed all interest which the city may have in the street or part of street so vacated to owner or owners of lots and lands next to and adjacent to same." The court held that the city's interest in the land ended when the street was closed, and that there was nothing remaining to quitclaim.[73] According to this theory statutory dedication vests the fee of the streets in the public only as long as it remains a street and upon vacation of the same, the land in the bed reverts to the dedicator, his heirs and assigns, and neither the state legislature nor the city can divert such title from the dedi-

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[70]Harris v. Elliott, 10 Pet. (35 U. S.) 25, 9 L. ed. 333.

[71]Harrington v. Iowa Cent. R. Co. 126 Iowa 388, 102 N. W. 139; In re East 168th St., 28 App. Div. 143, 52 N. Y. S. 588; Lynchburg v. Peters (Va.), 133 S. E. 674.

[72]Krueger v. Ramsey, 188 Iowa 861, 175 N. W. 1.

[73]Gebhardt v. Reeves, 75 Ill. 301.

cator,[74] to the owners of the adjacent lots. This reasoning is logical where the statutory dedication was made prior to the vacation act, but where the owner has made a statutory plat subsequent to the enactment of a vacation act, such as above, the provisions of the latter statute apply when the streets are closed, and the title to the land therein reverts to the then owners of abutting lots from which the land for the streets was originally taken,[75] for the municipality acquires a base or determinable fee only, and the right to the fee after vacation passes by way of conditional limitation to the grantees of the lots abutting thereon.[76]

[§ 274.] (C) **Special Application of the Rule.**—The case of Williams v. Johnson,[77] is of special interest because of the peculiar situation. The location of the highway had been changed so that the new side line in front of properties along one side lay entirely beyond the center line but nowhere beyond the far side line of the old location. Therefore if upon vacation of the old way, the owner of a property on the near side took fee to the center line, and the land beyond reverted to his neighbor on the far side of the road, or to the original grantor, access to the new road would be cut off. Under these circumstances the court held that where an existing public highway was designated as one of the boundaries of the land conveyed, the grantees obtained the right to use the entire highway as an appurtenant easement of the road, and upon the building of a new highway, such grantees from necessity and by estoppel of the grantor to deprive them of their easement were entitled to all the abandoned highway between their lots and the substituted road, even though the boundary is extended beyond the center of the highway.

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[74]Hill v. Kimball, 269 Ill. 398, 110 N. E. 18.

[75]Counselman v. Wisconsin Lime &c. Co., 299 Ill. 84, 132 N. E. 289.

[76]Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280, 18 A. L. R. 992.

[77]149 Ky. 409, 149 S. W. 821.

[§ 275.] (D) Fee to Be Taken by Extending Side Lines. —Where a subdivision is laid out with streets making other than right angles with one another, a confusing situation may arise apportioning the road bed among the abutting property owners. Such a case arose in State ex rel. Patterson v. King County,[78] where it was necessary to write a description of a certain parcel known as the Patterson property for condemnation proceedings instituted for the purpose of consolidating all the property in the blocks served by the vacated streets for terminal improvements. The plat covered tidal lands and the irregular shape of the Patterson property, together with the fact that it did not follow lot lines establishes that it was assembled with the aim of giving upland property access to the water front. Furthermore the property adjacent to the inner harbor line was fixed in location on the theory that upon abandonment of Puget Avenue the fee in the roadway would be determined solely by the extension of the side lines of the upland lots. This was Patterson's contention, and is repre-

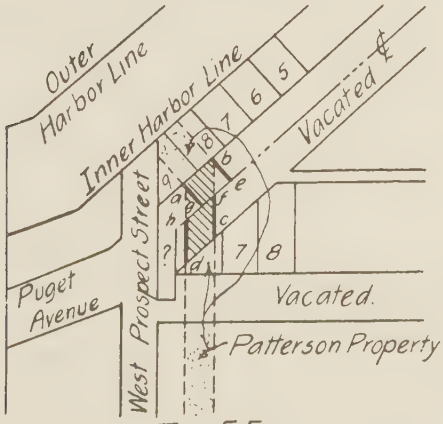

Fig. 55

[78]102 Wash. 331, 173 Pac. 186.

sented on the accompanying figure by the cross hatched area A, B, C, D.

It will be readily seen that if the court supported this contention, difficulties would arise in partitioning the vacated streets where the lots on opposite sides were held by different owners. Somewhere an owner would acquire more than his share, or there would be an unassigned area. Therefore the court held that the proper partition was to be attained by extending the lot lines and giving to Patterson the area A, B, E, F, C, D, H, G. The court noted that this did not settle how the bed of the vacated streets adjacent to West Prospect Street and the triangular Lots Six and Nine were to be partitioned, but merely raised the question without answering it.

CHAPTER V.

RIPARIAN BOUNDARIES.

I. GENERAL.

Section.
280. General.

II. LAW OF STATE GOVERNS.

281. Navigable Waters.
282. Non-navigable Waters.

III. DEFINITIONS.

283. Bank and Bed of a River.

IV. EFFECT OF PARTICULAR CALLS.

284. General.
285. Where Boundary is Ocean or Sea.
286. Where Boundary is Lake or Pond.
287. Where Boundary is River.
288. Where Bounded by Artificial Waters.

V. RIPARIAN RIGHTS.

289. General.
290. Right of Access.
291. Right to Make and Reclaim Land Under Tidal Water.
292. Right to Accretion—General.
293. Ownership of Accretions.
294. Islands.
295. Effect of Erosion.
296. Effect of Artificial Aids.
297. Apportionment of Accretions.
298. Effect of Avulsion.

VI. POWER OF STATE TO DISPOSE OF PUBLIC RIGHTS.

299. Power of State to Dispose of Public Rights.

I. GENERAL.

[§ 280.] The finality of the sea forces the shore upon man as a boundary, and although communication is possible between the banks of a navigable river, its presence makes the parcels on the opposite shores distinct tracts unsuitable for development as a unit. Non-navigable streams, although generally not so wide, are often impossible to cross or bridge at a reasonable expense, and for this reason consti-

tute a natural boundary. Rivers as boundaries have many strong advantages. They are natural monuments, visibly marking the boundary upon the ground, can be traced by the layman without the aid of an engineer, and their identity is certain. It is therefore natural for man to use rivers and streams as boundaries even though many lack the important property of stability.

This instability is not a minor consideration, for along the Oklahoma Texas boundary it involved property valued in excess of $100,000,000.[1] Had the presence of oil within the disputed area been known in the early history of the country the circumstances would have warranted the expenditure of large sums for the control of the Red River, but in general the cost of restraining a stream and giving the stability which nature abhors is too great for individual property owners to assume, and only in few instances do the circumstances warrant that the control of a stream be financed by the public. Therefore in desperation society has formulated rules of law to govern the effect of the inevitable movement of streams upon boundaries. In these rules due consideration must be given to the riparian rights which are attached to land bordering upon water, the conflicting interests of the public and the private proprietors, and the workings of nature. This has necessitated the acceptance of artificial criteria, based in some instances upon delicate distinctions, and even arbitrary foundations.

Although the breadth of the law has encouraged the development of general principles of wide application, nature has forced upon the courts the consideration of certain phenomena which do not permit a sharp line of distinction. At first thought it would appear that there is distinct dif-

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[1]Developments in Cadastral Resurveys, H. R. Farnsworth, Proceedings Am. Soc. Civil Engineers, Vol. XLVII, Nov. 1921, pp. 404, 434.

ference between avulsion and accretion. The former operates by exerting an overwhelming force during an imperceptible period of time, and gives insufficient or no warning of its occurrence. It is essentially an act of God which can neither be foreseen or resisted. It is spectacular and impresses upon all who witness its action the helplessness of those who have suffered to resist. Therefore its action does not disturb boundary lines, although it may deny one owner valuable riparian rights. Erosion on the other hand is slow, imperceptible in its action, but as time passes gives the owner whose land it is taking sufficient warning to enable him to take preventative measures. When the land is on the outer side of a convex bend, the location itself gives the owner notice of the inevitable erosion. Under these circumstances it may appear that if the proprietor does not attempt to resist nature, he should suffer the consequence, lose what land is washed away, and forfeit all title when the soil within his boundaries is gone and another proprietor has become riparian. Where the action is weak and may be mastered, and where the avulsion comes as a calamity, there is a decided distinction which permits of differentiation; but when the erosion is rapid as in parts of Missouri and Red Rivers, this rapidity signifies power, strength and persistence, and while not as spectacular as avulsion, is known and recognized by those who battle to control it to be as irresistible. Economic factors handicap men in the control of the forces of nature, and the persistence of a strong erosion may necessitate the resignation of a riparian owner to fate. Where these conditions exist the distinction between accretion and avulsion is often more arbitrary than real, a conclusion which is inevitably reached when the conditions necessary for a movement of stream to constitute an avulsion are analyzed.[2]

The courts of necessity must consider the practical oper-

[2]See § 298, infra.

ation of the rules of law, and it is most essential that they be simple in their application. They must possess a certainty sufficiently strong to eliminate distortion by the personal opinions of the judge and to assure uniformity in conclusions. Nature is erratic and is not respectful of man's desires or needs. Hence the rules of law regarding riparian boundaries are not satisfactory, and the formation of practical rules insuring adequate protection to the rights of the riparian proprietors and to the public present grave difficulties. The problem is both broad and of great importance, but it is not within the scope of this text, and the discussion following is confined to a statement of the law as it now exists.

II. LAW OF STATE GOVERNS.

[§ 281.] **(A) Navigable Waters.**—"At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon settlement of the colonies, like rights passed to the grantees in royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution of the United States. * * *

"The new states admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and the land under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.

"The United States * * * have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired,

of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union."[3]

The respective states by virtue of their sovereignty, may use or dispose of the lands underlying navigable waters within their jurisdiction as they choose, subject always to the rights of the public in such waters and to the paramount power of Congress for the regulation of commerce between the states and with foreign nations.[4] Land under navigable waters does not belong to the United States,[5] and therefore it can pass to a riparian grantee only by force of a declaration by the state which owns it, that it is attached and passes with the shore.[6]

[§ 282.] **(B) Non-navigable Waters.**—"In the case of land bounded on a non-navigable stream the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned."[7] However the grant of land in the bed of a non-navigable river made by the United States while holding complete sovereignty over the locality including it, can not be divested by a retroactive rule or declaration of the state subsequently created out of the territory, classifying the river as navigable.[8]

III. DEFINITIONS.

[§ 283.] **Bank and Bed of a River.**—The banks of a river are the elevations of land which confine the waters

[3]Gray, J., Shively v. Bowlby, 152 U. S. 1, 57, 38 L. ed. 331, 14 Sup. Ct. 548. See also Oklahoma v. Texas, 258 U. S. 574, 583, 66 L. ed. 771, 42 Sup. Ct. 406.

[4]Scott v. Lattig, 227 U. S. 229, 57 L. ed. 490, 33 Sup. Ct. 242, 44 L. R. A. (N. S.) 107.

[5]Hardin v. Shedd, 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. 685.

[6]Scott v. Lattig, 227 U. S. 229, 57 L. ed. 490, 33 Sup. Ct. 242, 44 L. R. A. (N. S.) 107.

[7]Hardin v. Shedd, 190 U. S. 508, 519, 47 L. ed. 1156, 23 Sup. Ct. 685.

[8]Brewer-Elliott Oil Co. v. United States, 260 U. S. 77, 67 L. ed. 140. 43 Sup. Ct. 60.

in their natural channel when they rise the highest and do not overflow the banks, and in that condition of the water the banks and the soil which is permanently submerged, form the bed of the river.[9] But if at any time either from rains or other cause, the river has overflowed its banks for a time, it does not by such overflow change its banks, within the rule fixing the high water mark as the boundary between a riparian owner and the public.[10] The banks are a part of the river, which includes the shores and the whole space through which the stream flows.[11] "The bed of the river is that portion of its soil which is alternately covered and left dry, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."[12] The bed of a river includes "all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time," and it excludes "the lateral valleys which have the characteristics of fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood,"[13] and in general the bed includes the shores which are the lands between high and low water marks.[14] The high water of a river not subject to tide is the line that the river impresses on the soil covering it for sufficient periods to deprive it of vegetation and to destroy its value for

[9]State v. Faudre, 54 W. Va. 122, 46 S. E. 269, 270, 102 Am. St. 927. See also Paine Lbr. Co. v. United States, 55 Fed. 854, 864.

[10]Sun Dial Ranch v. May Land Co., 61 Ore. 205, 119 Pac. 758.

[11]Dayton v. Cooper Hydraulic Co., 10 Ohio Dec. 192, 7 N. P. 495.

[12]Alabama v. Georgia, 23 How. (64 U. S.) 505, 514, 16 L. ed. 687, cited in Oklahoma v. Texas, 260 U. S. 606, 631, 67 L. ed. 428, 43 Sup. Ct. 221.

[13]Oklahoma v. Texas, 260 U. S. 606, 632, 67 L. ed. 428, 43 Sup. Ct. 221.

[14]State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 So. 353.

agriculture.[15] In general, in nontidal waters such as streams, lakes or ponds high and low water marks are those lines to which the water recedes or advances at ordinary stages,[16] and not that occurring under unusual conditions.[17]

Thread of a River.—The thread of a stream or river when called for as a boundary line is the middle line between the shores, irrespective of the depth of the channel, taking them in the natural and ordinary stage of the water, at medium heights, neither swollen by freshets or shrunk by droughts.[18] It is irrespective of the channel which may lie on either side of the thread, and is determined solely by establishing the mid line between shores at the natural and ordinary stage of the water,[19] and in Oregon it has been held that where one bank of a non-navigable stream is much steeper than the other, placing the thread of the stream, as measured from high water mark on an exposed sand bar on one bank when the water is low, the thread of the stream should be ascertained by measuring from the low water mark.[20]

Thread of a lake when used in connection with boundaries means, where there is no outlet or inlet, the line passing through the center of the lake along its longest diameter.[21]

Navigable.—At common law the term "navigable river" was confined to rivers or arms of the sea in which the tide ebbed and flowed, all fresh waters being non-navigable, but all streams actually capable of navigation were common highways for commerce.[22] A river is navigable if the tide

[15]Raide v. Dollar, 34 Idaho 682, 203 Pac. 469.

[16]Stover v. Jack, 60 Pa. 339, 100 Am. Dec. 566.

[17]McBurney v. Young, 67 Vt. 574, 32 Atl. 492.

[18]State v. Muncie Pulp Co., 119 Tenn. 47, 104 S. W 437.

[19]Warren v. Thomaston, 75 Maine 329, 46 Am. Rep. 397.

[20]Micelli v. Andrus, 61 Ore. 78, 120 Pac. 737.

[21]Calkins v. Hart, 64 Misc. 149, 118 N. Y. S. 1049.

[22]Fulton L., H. &c. Co. v. State, 200 N. Y. 400, 94 N. E. 199, 37 L. R. A. (N. S.) 307.

ebbs and flows therein, or if it is in fact navigable during some season of the year for the floatage of boats, lighters, rafts, logs, etc.,[23] and it is not necessary that the waters be navigable in all their parts,[24] or that the navigable portion be open to use all of the year.[25] A lake on which a steamboat carrying pleasure parties is operated and on which small boats are used for rowing and fishing is a navigable water,[26] but one not of sufficient size to warrant its use for maritime and commercial purposes is not navigable.[27] While it has been held that a river capable of floating logs is a navigable stream,[28] the term "navigation" in all the statutes of the United States and in the constitutions and all treaties does not mean the running saw logs down a river,[29] and it has been held in some states that the mere rafting of timber or transporting wood in small boats does not make a stream navigable,[30] although it gives the public an easement in the stream for such purposes and precludes the riparian owner from erecting unreasonable obstructions.[31] In certain jurisdictions all streams over a given width set down in the statutes are considered as navigable.[32] A stream capable of use for pleasure boating, fowling, cutting ice, etc., is not necessarily navigable,[33] for a

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[23]In re Delaware River at Stillesville, 131 App. Div. 403, 115 N. Y. S. 745, 750.

[24]Schulte v. Warren, 218 Ill. 108, 73 N. E. 783, 13 L. R. A. (N. S.) 745; Danes v. State, 219 N. Y. 67, 113 N. E. 786; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs., 168 U. S. 349, 359, 42 L. ed. 497, 18 Sup. Ct. 157.

[25]McKinney v. Northcott, 114 Mo. App. 146, 89 S. W. 351.

[26]Kalez v. Spokane Valley Land &c. Co., 42 Wash. 43, 84 Pac. 395.

[27]Geneva v. Henson, 140 App. Div. 49, 124 N. Y. S. 588.

[28]In re Southern Wis. Power Co., 140 Wis. 245, 122 N. W. 801; Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905; Logan v. Charles K. Spaulding Logging Co., 100 Ore. 731, 190 Pac. 349.

[29]Duluth Lbr. Co. v. St. Louis B. &c. Co., 17 Fed. 419.

[30]Seaboard Air Line R. Co. v. Sikes, 4 Ga. App. 7, 60 S. E. 868; Miller v. State, 124 Tenn. 293, 137 S. W. 760, 35 L. R. A. (N. S.) 407.

[31]Burr's Ferry B. &c. R. Co. v. Allen (Tex. Civ. App.), 164 S. W. 878; Floyd County v. Allen, 190 Ky. 532, 227 S. W. 994.

[32]Burr's Ferry B. &c. R. Co. v. Allen (Tex. Civ. App.), 164 S. W. 878.

[33]United States v. Rio Grande Dam & Irrigation Co., 174 U. S.

stream to be navigable must afford a channel for useful commerce of practical utility to the public.[34] The question as to whether a stream or lake is navigable is ordinarily one of fact,[35] and is to be determined by inquiring whether it is used or is susceptible of being used,[36] the burden of proof of which rests upon the party asserting it.[37] The attitude of the Federal Government[38] and of the state[39] while not conclusive is an influential consideration and is not without potency. Statutory declarations of navigability should not be extended to waters not included in the terms of the statute,[40] nor should they be interpreted as inferring that streams or lakes not included are non-navigable.[41] Upon considerations of actual capacity and utility for purposes of commerce, numerous specific rivers have been declared navigable, or non-navigable according to the actual conditions existing.[42]

Sea and Seashore.—For all the ordinary purposes of a boundary when the ocean or a bay or other body of water affected by the flux and reflux of the tide is made a limit the words "seashore" and "sea" in the absence of any showing to the contrary appear to be practically synonymous,[43] and the term seashore extends as far landward as the tide flows.[44] It is defined by Bouvier as "that space of land on the borders of the sea which is alternately covered and left dry by the rising and falling of the tide, or in other

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690, 698, 43 L. ed. 1136, 19 Sup. Ct. 770.

[34]People ex rel. Economy L. &c. Co., 241 Ill. 290, 89 N. E. 760, 771.

[35]Healy v. Joliet &c. R. Co., 116 U. S. 191, 29 L. ed. 607, 6 Sup. Ct. 352.

[36]Oklahoma v. Texas, 258 U. S. 574, 586, 66 L. ed. 771, 42 Sup. Ct 406.

[37]Mintzer v. North American Dredging Co., 242 Fed. 553, 559.

[38]Amite Gravel &c. Co. v. Roseland Gravel Co., 148 La. 704, 87 So. 718.

[39]Mintzer v. North American Dredging Co., 242 Fed. 553, 561.

[40]People ex rel. v. Economy L. &c. Co., 241 Ill. 290, 89 N. E. 760.

[41]In re Rutland Drainage Dist., 148 Wis. 421, 134 N. W. 838.

[42]45 Corpus Juris 417.

[43]Coburn v. San Mateo County, 75 Fed. 520, 528.

[44]Commonwealth v. Alger, 7 Cush. (61 Mass.) 53, 90.

words, that space between high and low water marks."[45] While in Louisiana it has been held that the seashore is that space of land over which the sea spreads in the highest water during the winter season,[46] it is more generally understood to be the margin of the sea in its usual and ordinary state and to be comprised of the ground between ordinary high and low water.[47]

High Water.—The usual or ordinary high water mark constituting a boundary on tidal water is not the limit of the monthly spring tides, but that reached by the neap tides,[48] that is those occurring one or two days after the first and third quarters of the moon. It has also been defined as the line "limited by the outflow of the medium high tide between the spring and neap tides."[49]

Low Water.—Low water is the margin of the sea when the tide is out at ordinary low tides[50] and not the line to which the tide ebbs when from natural causes it is at its lowest.[51] Where a river empties into tidal water, the low water mark is the lowest line made by the receding tide with the land; and not the lowest line which a stream or a cove, or a tidal river makes with the land.[52]

IV. EFFECT OF PARTICULAR CALLS.

[§ 284.] **(A) General.**—The technical construction of the terms used in describing riparian boundaries should never be applied to overcome the intention of the parties to the transaction, for where this is definitely expressed in

[45]Church v. Meeker, 34 Conn. 421, 424. See also United States v Pacheco, 2 Wall. (69 U. S.) 587, 590, 17 L. ed. 865.

[46]Minor v. New Orleans, 115 La. 301, 38 So. 999.

[47]Storer v. Freeman, 6 Mass. 435, 439, 4 Am. Dec. 155.

[48]Forgeus v. Santa Cruz County, 24 Cal. App. 193, 140 Pac. 1092.

[49]New Jersey Zinc &c. Co. v. Morris Canal &c. Co., 44 N. J. Eq. 398, 15 Atl. 227, 228, 1 L. R. A. 133.

[50]Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155.

[51]Gerrish v. Union Wharf, 26 Maine 384, 46 Am. Dec. 568, 571.

[52]Tappan v. Boston Water Power Co., 157 Mass. 24, 31 N. E. 703, 705, 16 L. R. A. 353.

the deed, or may be established by proper evidence, it must be given force.[53] In the absence of an expressed contrary intention, flats and other lands under water and owned by the grantor pass with a conveyance of the upland,[54] and ordinarily a deed by metes and bounds which on the river side are substantially coincident with the high water mark, carries all the right of the grantor to the shore of the stream.[55] The presumption is rebuttable, but when the intention is ascertainable from the face of the instrument of a record, evidence to overcome it is not admissible.[56]

[§ 285.] (B) Where the Boundary Is the Ocean or the Sea.—At common law the title to that part of the beach below high water mark is in the state,[57] and consequently where land is bounded by the ocean, sea, or bay, or along the shore line of tidal water, the line of ordinary high water marks the limit of the grant;[58] but if the body of water is distinctly called for in the deed, the water proper and not the shore is the boundary of the land conveyed.[59]

In Massachusetts,[60] Maine[61] and New Hampshire[62] the common law has been modified by colonial ordinances of 1641, 1647[63] so as to give the soil of the shore to low water mark, provided the tide does not ebb more than one hundred rods, and to that extent where the tide ebbs a greater

[53]McLellan v. McFadden, 114 Maine 242, 95 Atl. 1025. See § 65, supra.

[54]Whitmore v. Brown, 100 Maine 410, 61 Atl. 985.

[55]McDonald v. Whitehurst, 47 Fed. 757.

[56]Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 117 Am. St. 534, 6 L. R. A. (N. S.) 162.

[57]Brower v. Wakeman, 88 Conn. 8, 89 Atl. 913.

[58]People of Porto Rico v. Fortuna, 279 Fed. 500; Tiffany v. Oyster Bay, 209 N. Y. 1, 102 N. E. 585; Seaman v. Smith, 24 Ill. 521, 524; United States v. Pacheco, 2 Wall. (69 U. S.) 587, 590, 17 L. ed. 865; Yard v. Ocean Beach Assn., 49 N. J. Eq. 306, 24 Atl. 729; Plainfield-Union Water Co. v. Plainfield, 84 N. J. L. 634, 87 Atl. 448.

[59]Tiffany v. Oyster Bay, 209 N. Y. 1, 102 N. E. 585.

[60]Boston v. Lecraw, 17 How (58 U. S.) 426, 15 L. ed. 118.

[61]Snow v. Mt. Desert Island R. E. Co., 84 Maine 14, 24 Atl. 429, 30 Am. St. 333, 17 L. R. A. 280.

[62]Clement v. Burns, 43 N. H. 609.

[63]Shively v. Bowlby, 152 U. S. 1, 18, 38 L. ed. 331, 14 Sup. Ct. 548.

distance to the adjoining landowners, and the flats pass by a grant of the upland unless they are excluded by the terms of the grant.[64] In these three states and in other jurisdictions where, by a grant from the state, the seaward boundary of upland has been extended to the low water mark, the construction of terms ordinarily used in the conveyancing of shore property is important. "The space between high and low water mark, properly called the shore, is frequently of many rods in width; it has an outer or seaward side, and an inner or upland side; and, nothing else appearing, a boundary by the shore may be as well intended to mean the one as the other." The owner of the upland and the shore may separate the ownership by the conveyance of one and the retention of the other.[65]

To determine which side of a boundary described as "by the shore" is intended, the starting point of the call, as fixed by the terminal of the preceding course is of great importance. Thus where the boundary line of a lot is "to the shore and thence by the shore" the side line terminates at the high water line, for the word "to" is a word of exclusion rather than inclusion; and in the absence of other calls and circumstances showing a contrary intention, the inner side of the shore is the boundary. But where the preceding course is described as running to a named cove or to the waters of a certain bay, or a distance which carries the line to low water, the shore boundary is the seaward side, and the shore is included in the grant. By analogy where the terminals of the lines succeeding and following a shore boundary are at highwater, the shore is excluded.[66] Where the terminal of the side line is fixed by a call for a monument, the location of the same either at

[64]Proctor v. Maine Cent. R. Co., 96 Maine 458, 52 Atl. 933.

[65]Dunton v. Parker, 97 Maine 461, 54 Atl. 1115, 1118.

[66]See § 206, supra.

high or low water determines the side of the shore to be followed.[67]

In general terms "by the beach"[68] (which is the equivalent of the shore)[69], and "to the shore"[70] exclude the land between high and low water, but the terms "to the sea,"[71] "by the sea or beach,"[72] "along the shore,"[73] "along the bay,"[74] "on a stream,"[75] "by a stream,"[76] or "to a stream"[77] include to low water, and land described as bounded "by a named harbor" has been held to include the flats between high and low water, although the description would have been satisfied, both as regards the quantity of land conveyed and the length of the bounding lines, by applying it to the upland alone.[78]

In New York a patent from the crown of lands bounded by navigable tide water has been held to convey no title to land below high water, but merely jurisdiction over the same which is to be held and administered for the crown,[79] and a similar grant to the city of New York was held to convey the land between high and low water to the city in trust for the public; so that a later conveyance by the city to a private person describing the land as bounded by the Hudson River was limited to the line of high water.[80] Likewise a grant from a colonial governor which described land as "following the seashore to another small creek (Flushing) then along the course thereof" has been ruled as

[67]Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155.

[68]Niles v. Patch, 13 Gray (79 Mass.) 254.

[69]Littlefield v. Littlefield, 28 Maine 180.

[70]Montgomery v. Reed, 69 Maine 510.

[71]Jackson v. Boston &c. R. Corp. 1 Cush. (55 Mass.), 575.

[72]Doane v. Wilcutt, 5 Gray, (71 Mass.) 328.

[73]Church v. Meeker, 34 Conn. 421.

[74]Bechtel v. Edgewater, 45 Hun 240.

[75]Thomas v. Hatch, Fed. Cas. 13899, 3 Sumn. 170.

[76]Thomas v. Hatch, Fed. Cas. 13899, 3 Sumn. 170.

[77]Thomas v. Hatch, Fed. Cas. 13899, 3 Sumn. 170.

[78]Mayhew v. Norton, 17 Pick. (34 Mass.) 357, 28 Am. Dec. 300.

[79]DeLancey v. Piepgras, 138 N. Y. 26, 33 N. E. 822.

[80]In re Mayor of New York, 182 N. Y. 361, 75 N. E. 156, 108 Am. St. 809.

limiting the grant to high water,[81] but where the colonial patent included all "woods, beaches, marshes, pastures, creeks, waters, lakes, fishing, hunting and fowling" title to land under the water passed to the grantee,[82] and a subsequent conveyance of a portion of the land describing the water boundary as "along the shore" was construed to include the land between high and low water where the quantity and monuments confirmed the intention to take to the outer line.[83]

[§ 286.] (C) Where the Boundary Is a Lake or Pond. —The Great Lakes have been classed with the tide water, and the same rules regarding riparian boundaries pertaining to the ocean or sea are held as applying thereto.[84] Except in Michigan, where the title of the upland owner is limited to the meander line, which is presumed to have followed the existing shore when it was run, and the land beyond the meander as it becomes dry land by accretion or reliction is held by the state in trust for the public,[85] the boundaries of riparian owners extend to the natural shore, although the water does not always stand at that elevation.[86]

In some jurisdictions the title of a riparian owner extends to the middle of a navigable inland lake,[87] but in others it is limited to a shore line, and title to the bed re-

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[81]Clark v. New York, 165 App. Div. 873, 151 N. Y. S. 714.

[82]Oakes v. DeLancey, 71 Hun 49, 24 N. Y. S. 539, 54 N. Y. St. 87, affd. 143 N. Y. 673, 39 N. E. 21.

[83]Oakes v. Delancey, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. 628. See also § 206, supra.

[84]Kavanaugh v. Rabior, 222 Mich. 68, 192 N. W. 623. See § 293, infra.

[85]Kavanaugh v Rabior, 222 Mich. 68, 192 N. W. 623.

[86]Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. 905; Stewart v. Turney, 237 N. Y. 117, 142 N. E. 437, 31 A. L. R. 960; Slauson v. Goodrich Transp. Co., 94 Wis. 642, 69 N. W. 990; Sloan v. Biemiller, 34 Ohio St. 492.

[87]Webber v. Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Cobb v. Davenport, 32 N. J. L. 369; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393. See also note, 44 Am. Rep. 393.

mains in the state in trust for public purposes.[88] It is generally held that a boundary on a natural non-navigable lake or pond carries title to the center,[89] but in a few jurisdictions it is held to the contrary, and the fee is limited to the shore or low water mark.[90] In Massachusetts and Maine the decisions are based upon a colonial ordinance of 1647 making every lake of ten acres extent public.[91]

Where a deed of a farm bordering on a lake described the premises conveyed as beginning "at a hickory standing on the north bank of the Copake Lake on the north side of the road, thence S 57″ 0″ E 7." 50 along said road and lake S 30″ 0″ E 14.30 along the same to a birch at corner of No. 37 etc.," it was held that grant included the land to the mid line of the lake, although the hickory stood on the road and not on the lake, and the lines of the survey embraced the acreage called for, and did not extend to the shores.[92] The expression "along the east shore of said pond" is construed as excluding the land under the water and limits the grant to the shore line,[93] and where two deeds in the chain of title described the boundary as "by the edge of mill pond" and as "the bank of said mill," a subsequent grantee, regardless of the description in intervening conveyances, ac-

[88]Breese v. Wagner, 187 Wis. 109, 203 N. W. 764; Hazen v. Perkins, 92 Vt. 414, 105 Atl. 249, 23 A. L. R. 748; State v. Korrer, 127 Minn. 60, 148 N. W. 617, 1095; Roberts v. Taylor, 47 N. Dak. 146, 181 N. W. 622; Champlain & St. L. R. Co. v. Valentine, 19 Barb. (N. Y.) 484; Stewart v. Turney, 237 N. Y. 117, 142 N. E. 437, 31 A. L. R. 960; Stewart v. Turney, 203 App. Div. 486, 197 N. Y. S. 81; Stewart v. Turney, 117 Misc. 398, 191 N. Y. S. 342.

[89]Linthicum v. Shipley, 140 Md. 96, 116 Atl. 871, 23 A. L. R. 754; note, 18 L. R. A. 695.

[90]Boardman v. Scott, 102 Ga. 404, 30 S. E. 982; Hardin v. Shedd. 190 U. S. 508, 47 L. ed. 1156, 23 Sup. Ct. 685; State v. Gilmanton, 9 N. H. 461, 463; Kanouse v. Slockbower, 48 N. J. Eq. 42, 21 Atl. 197; Paine v. Woods, 108 Mass. 160; Stevens v. King, 76 Maine 197, 49 Am. Rep. 609; Patapsco Guano Co. v. Bowers-White Lbr. Co., 146 N. C. 187, 59 S. E. 538, 125 Am. St. 473, 13 L. R. A. (N. S.) 318; Noyes v. Collins, 92 Iowa 566, 61 N. W. 250, 54 Am. St. 571, 26 L. R. A. 609; Fletcher v. Phelps, 28 Vt. 257; Diedrich v. Northwestern U. R. Co., 42 Wis. 248, 24 Am. Rep. 399.

[91]West Roxbury v. Stoddard, 7 Allen (89 Mass.) 158.

[92]Land & Lake Assn. v. Conklin, 182 App. Div. 546, 170 N. Y. S. 427.

[93]Landon v. Clark, 242 Fed. 30.

quired no fee to the land beyond the bank, for these deeds precluded subsequent grantors from conveying the same.[94]

[§ 287.] **(D) Where Boundary Is a River.**—It is generally held in the United States that private ownership of lands bordering on tidal and navigable water extends only to the high water mark,[95] and the same is true where the stream is tidal but not navigable.[96] Where the stream is non-tidal and navigable, the statutes and practice of the various jurisdictions must be considered, and consequently there is considerable conflict regarding the extent of a grant along such a stream, and this is not to be reconciled. The Supreme Court of the United States has noted that the tidal test to differentiate beween navigable and non-navigable waters, although practical in England where it was developed, is not a workable criterion in America where there are broad, navigable rivers above the tide water;[97] and although it has implied that sound principles of public policy require that the states retain title to the bed of navigable waters, it has consistently recognized that it is clearly for the states to determine the rules fixing the extent of private ownership of land bordering on navigable streams, and that, if they choose to resign to the riparian owners rights which more properly belong to them, it is not for others to object.[98] As noted by the Idaho courts the smaller eastern states where the common law test brought from England is reasonably applicable, adhere to English practice, while those states which are more remote from salt water, or whose rivers are large and independent of the tide for navigability tend to depart from the com-

[94]Holden v. Chandler, 61 Vt. 291, 18 Atl. 310.

[95]Apalachicola Land &c. Co. v. McRae, 86 Fla. 393, 98 So. 505.

[96]Carver v. San Pedro L. A. &c. R. Co., 151 Fed. 334, 336.

[97]Barney v. Keokuk, 94 U. S. 324, 338, 24 L. ed. 224.

[98]Donnelly v. United States, 228 U. S. 243, 261, 57 L. ed. 820, 33 Sup. Ct. 449.

mon law.[99] In a number of states in the absence of any call in the deed to the contrary, it is presumed that a grant on a navigable fresh water river is carried to the thread of the stream,[1] but the question of the title and boundary of a riparian owner is purely one of local law.[2] In certain jurisdictions a boundary by a navigable stream takes to high water,[3] while in others it takes to low water.[4] In Kentucky as regards riparian boundaries all streams are non-navigable.[5]

When a navigable river constitutes the boundary be-

[99]Northern Pac. R. Co. v. Hirzel, 29 Idaho 438, 161 Pac. 854.

[1]Shively v. Bowlby, 152 U. S. 1, 31, 38 L. ed. 331, 14 Sup. Ct. 548; Delaney v. Boston, 2 Har. (Del.) 489; Jones v. Water Lot Co., 18 Ga. 539; Ulbright v. Baslington, 20 Idaho 539, 119 Pac. 292, 294; Sikes v. Moline Consumers Co., 293 Ill. 112, 127 N. E. 342; Tempel v. United States, 248 U. S. 121, 129, 63 L. ed. 162, 39 Sup. Ct. 56; Wilson v. Watson, 144 Ky. 352, 138 S. W. 283, 35 L. R. A. (N. S.) 231; Brown v. Chadbourne, 31 Maine 9, 50 Am. Dec. 641; Bowie v. Western Md. R. Term. Co., 133 Md. 1, 104 Atl. 461; Boston v. Richardson, 105 Mass. 351; Sewers v. Hacklander, 219 Mich. 143, 188 N. W. 547; New Orleans M. &c. R. Co. v. Frederic, 46 Miss. 1; Norway Plains Co. v. Bradley, 52 N. H. 86; Paterson v. East Jersey Water Co., 74 N. J. Eq. 49, 70 Atl. 472; Waterford Electric L. H. & Co. v. State, 208 App. Div. 273, 203 N. Y. S. 858; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242; Lake Shore &c. R. Co. v. Platt, 53 Ohio St. 254, 41 N. E. 243; McDaniel v. Greenville-Carolina Power Co., 95 S. C. 268, 78 S. E. 980. See also Cates v. Wadlington, 1 McCord (S. Car.) 580, 10 Am. Dec. 699; Miller v. Mann, 55 Vt. 475; Farris v. Bentley, 141 Wis. 671, 124 N. W. 1003.

[2]Oklahoma v. Texas, 258 U. S. 574, 595, 66 L. ed. 771, 42 Sup. Ct. 406.

[3]Wallace v. Driver, 61 Ark. 429, 33 S. W. 641; Chapman v. Kimball, 9 Conn. 38, 21 Am. Dec. 707; Watt v. Robbins, 160 Iowa 587, 142 N. W. 387; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330; State v. Nolegs, 40 Okla. 479, 139 Pac. 943; Wilson v. Forbes, 13 N. Car. 30; Armstrong v. Pincus, 81 Ore. 156, 158 Pac. 662; Harper v. Holston, 119 Wash. 436, 205 Pac. 1062.

[4]Webb v. Demopolis, 95 Ala. 116, 13 So. 289; Irvin v. Crammond, 58 Ind. App. 540, 108 N. E. 539; Wemple v. Easthan, 150 La. 247, 90 So. 637; State v. Korrer, 127 Minn. 60, 148 N. W. 617, 1095; Gibson v. Kelly, 15 Mont. 417, 39 Pac. 517; Widdicombe v. Rosemiller, 118 Fed. 295; Roberts v. Taylor, 47 N. Dak. 146, 181 N. W. 622; Leaf v. Pennsylvania Co., 268 Pa. 579, 112 Atl. 243; State v. Muncie Pulp Co., 119 Tenn. 47, 104 S. W. 437; Stuart v. Clark, 2 Swan (32 Tenn.) 9, 58 Am. Dec. 49; Brown Oil Co. v. Caldwell, 35 W. Va. 95, 13 S. E. 42, 29 Am. St. 793.

[5]Robinson v. Wells, 142 Ky. 800, 135 S. W. 317.

tween two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream, the one usually followed and not the thread as fixed by physical mean line,[6] and the doctrine of Thalweg as above set forth applies to the boundaries between the several states of the United States except where treaty provisions have established some other line, such as the Georgia-Alabama line on the west bank of the Chattahoochee,[7] the Kentucky-Indiana-Ohio line on the north side of the Ohio,[8] the Texas-Arkansas-Oklahoma boundary on the south bank of the Red River,[9] the Maryland-West Virginia boundary on the south bank of the Potomac at low water[10] and the District of Columbia-Virginia line along high water on the Virginia shore of the Potomac;[10a] or where the boundary is in fact a lake or landlocked sea where there is no necessary track of navigation in which event the line is drawn in the middle, there being no usually followed channel.[11]

In New York Harbor the boundary between New York and New Jersey below 41°N latitude is in the middle of the Hudson, the Bay, the waters west of Staten Island, and Raritan Bay, but by the agreement of 1834 the former state has jurisdiction over all the waters of the bay and the islands regardless of position, but the sovereignty west of the true boundary remains in New Jersey, and this state may levy taxes on land beneath its waters, regulate im-

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[6]Minnesota v. Wisconsin, 252 U. S. 273, 281, 64 L. ed. 558, 40 Sup. Ct. 313.

[7]Alabama v. Georgia, 23 How. (64 U. S.) 505, 16 L. ed. 687.

[8]Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. 1051; Booth v. Shepherd, 8 Ohio St. 243.

[9]United States v. Texas, 162 U. S. 1, 40 L. ed. 867, 16 Sup. Ct. 725; Oklahoma v. Texas, 260 U. S. 606, 67 L. ed. 428, 43 Sup. Ct. 221.

[10]Maryland v. West Virginia, 217 U. S. 577, 54 L. ed. 888, 30 Sup. Ct. 630; Marine R. &c. Co. v. United States, 257 U. S. 47, 66 L. ed. 124, 42 Sup. Ct. 32.

[10a]Marine R. & Coal v. United States, 257 U. S. 47, 66 L. ed. 124, 42 Sup. Ct. 32; Herald v. United States, 284 Fed. 927.

[11]Louisiana v. Mississippi, 202 U. S. 1, 50, 50 L. ed. 913, 26 Sup. Ct. 408.

provements on the shore, and make grants of shore lands according to its statutes.[12]

These special conditions modify the usual rule of a particular jurisdiction, and in Georgia where a grant on a navigable tidal stream ordinarily takes to the thread, one along the Chattahoochee which borders the west margin of the state takes to the far shore.[13] But in Kentucky where the low water mark on the Indiana shore is the state boundary, land owners on the Kentucky side take only to the thread of the Ohio;[14] and in New York, where with certain exceptions particularly in regard to the Hudson, Mohawk, Genesee and Allegheny rivers,[14a] the beds of which are owned by the people, riparian owners take to the center of the stream. A conveyance on the International Boundary along the Niagara River follows the rule applying to the Great Lakes and takes to the water's edge only.[15]

A grant or conveyance bounded by a non-navigable stream carries with it the bed of the stream to the center,[16] and title to all islands on grantee's side within the limits of the side lines produced,[17] but the general rule may be overcome by an expressed intention to the contrary.[18] Where streams or lakes are called for as natural boundaries, and their courses are given in the deed by meander lines, the stream itself and not the meander line is the true boundary,[19] but this rule is subject to modifications, and

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[12]Central R. R. v. Jersey City, 209 U. S. 473, 52 L. ed. 896, 28 Sup. Ct. 592; Leary v. Jersey City, 248 U. S. 328, 63 L. ed. 271, 39 Sup. Ct. 115.

[13]Jones v. Water Lot Co., 18 Ga. 539.

[14]Bedford-Nugent Co. v. Herndon, 196 Ky. 477, 244 S. W. 908.

[14a]Buffalo Pipe Line v. New York L. E. &c. R. Co., 10 Abb. (N. Cas., N. Y.) 107.

[15]Kingman v. Sparrow, 12 Barb. 201, reversed 1 N. Y. 242, 4 How. Prac. 367.

[16]Shawmut Mfg. Co. v. Benton, 123 Maine 121, 122 Atl. 49. See § 230, supra.

[17]Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. 530; Wall v. Wall, 142 N. Car. 387, 55 S. E. 283.

[18]See § 242, supra.

[19]Harper v. Holston, 119 Wash. 436, 205 Pac. 1062; United States v. Lane, 260 U. S. 6[illegible]2, 67 L. ed. 448, 43 Sup. Ct. 236

where the facts and circumstances affirmatively disclose that the meander line is clearly adopted as the boundary,[20] or where there is in fact no shore,[21] or the shore is at an excessive distance from the meander line,[22] the grant is limited to the land within the meander lines.

In a conveyance the words "to," "on," "by," "at," and "along" a non-tidal stream presumptively carry the title as far into the stream as the grantor owns,[23] and it has been held that the calls "to the river, thence by the river shore," conveyed to the center of the stream,[24] but in general where the boundary is on the bank,[25] upon the bank,[26] beginning at point and running down the bank,[27] or along the shore[28] (of a river) the boundary is the edge or margin of the river. Likewise when a boundary runs from a street or stream, or alongside a street or stream, the center line is taken ordinarily as the limit of the grant.[29] However where the deed calls for a monument on top of the bank of a non-navigable stream, and then for the stream as a natural monument, the latter will control, and the boundary of the grant will be taken as the river.[30]

[§ 288.] **(E) Where Bounded by Artificial Waters.**—In the absence of a clearly expressed intention to the contrary, a boundary upon a canal, ditch, or millrace carries

[20]Producers Oil Co. v. Hanzen, 238 U. S. 325, 59 L. ed. 1330, 35 Sup. Ct. 755; Tolleston Club v. Lindgren, 39 Ind. App. 448, 77 N. E. 818; Tolleston Club v. Carson, 188 Ind. 642, 123 N. E. 169. See also Tuesburg Land Co. v. State, 78 Ind. App. 327, 131 N. E. 530.

[21]Barringer v. Davis, 141 Iowa 419, 120 N. W. 65.

[22]Fuller v. Shedd, 161 Ill. 462, 44 N. E. 286, 52 Am. St. 380, 33 L. R. A. 146; Jeems Bayou Fishing &c. Club v. United States, 260 U. S. 561, 67 L. ed. 402, 43 Sup. Ct. 205.

[23]Leary v. Jersey City, 189 Fed. 419, 428.

[24]Sleeper v. Laconia, 60 N. H. 201, 49 Am. Rep. 311.

[25]Bradford v. Cressey, 45 Maine 9.

[26]Daniels v. Cheshire R. Co., 20 N. H. 85.

[27]Babcock v. Utter, 1 Keyes (40 N. Y.) 397, 1 Abb. Dec. 27, 32 How. Prac. 439.

[28]Child v. Starr, 4 Hill (N. Y.) 369, reversed 5 Denio 599.

[29]Palmer v. Mann, 206 App. Div. 484, 201 N. Y. S. 525.

[30]Carter v. Chesapeake &c. R. Co., 26 W. Va. 644, 53 Am. Rep. 116.

the grant to the center line thereof,[31] but as set forth in Carter v. Chesapeake and Ohio Railroad Company[32] there are many reasons why the usual presumption is reversed in the case of an artificial waterway, and a grant that clearly limits the boundary to line upon or beyond its bank passes no fee to the soil in the artificial channel.[33] A boundary by an artificial pond will generally take to the center of the original stream[34] unless qualified to the contrary, but when such a pond has existed for a long period of years, and has become regarded as a permanent feature of the topography, it may acquire the properties of a natural lake, and the rule applicable to such may fix the boundary.[35] Where the boundary is to the edge of a lake or pond, and the owner of the upland therefore has no fee in the soil beneath the water, he can gain nothing by accretion or reliction, the boundary remaining fixed by the line of the water as of date of deed.[36]

V. RIPARIAN RIGHTS.

[§ 289.] (A) General.—A riparian owner is one who claims to the ripa or bank of a river, or to high water, and the rights incident to such ownership are dependent not upon title to the bed but upon the fee to the bank,[37] and there can be no riparian rights unless the land involved borders on a body of water;[38] but the intervention of a public street between uplands and navigable water where the

[31]Tagliaferri v. Grande, 16 N. Mex. 486, 120 Pac. 730; Warren v. Gloversville, 81 App. Div. 291, 80 N. Y. S 912.

[32]Carter v. Chesapeake &c. R. Co., 26 W. Va. 644, 53 Am. Rep. 116.

[33]Nichols v. New England Furn. Co., 100 Mich. 230, 59 N. W. 155.

[34]Roberts v. Decker, 120 Wis. 102, 97 N. W. 519, 522; Mad River Co. v. Pracney, 100 Conn. 466, 123 Atl. 918.

[35]Patapsco Guano Co. v. Bowers-White Lbr. Co., 146 N. Car. 187, 59 S. E. 538, 125 Am. St. 473, 13 L. R. A. (N. S.) 318.

[36]Holden v. Chandler, 61 Vt. 291, 18 Atl. 310.

[37]United Paper Board Co. v. Iroquois Pulp &c. Co., 226 N. Y. 38, 123 N. E. 200.

[38]Tuesburg Land Co. v. State, 78 Ind. App. 327, 131 N. E. 530.

title of the bed of the street is in the adjoining owners, does not deprive them of riparian rights,[39] nor does the title of a railroad company to land underlying its right of way destroy the riparian rights appurtenant to the upland in front of which it runs, although it may modify them to the extent that physical conditions compel.[40] However riparian rights may attach to land acquired by railroad companies for other purposes than the right of way, as where the access to navigation is essential to the movement of goods, and the land in question was acquired for this particular purpose, and the intervention of such land between the water and an upland owner will deny him riparian rights.[41] Riparian rights are incident to the ownership of land bordering on water and pass with the transfer of such property although not designated as such in the conveyance. In general terms they connote the rights and profit to the owner of the upland arising from its connection with the water, such as the easement of passage and use, subject however, to governmental regulation for the improvement of navigation.[42] They are regarded as valuable property rights[43] and can not be interfered with for public purposes without compensation.[44]

[§ 290.] **(B) The Right of Access.**—The riparian owner in addition to the rights which he shares with others as one of the public has many rights incident to his ownership of riparian land. Although the general public has the right of navigation upon the water and the use of the shore or bank,[45] it does not have the right to cross or occupy pri-

[39]Moenig v. New York Cent. R. Co., 187 App. Div. 323, 175 N. Y. S. 665. See also § 238, supra.

[40]Moenig v. New York Cent. R. Co., 187 App. Div. 323, 175 N. Y. S. 665.

[41]Moenig v. New York Cent. R. Co., 187 App. Div. 323, 175 N. Y. S. 665.

[42]In re West 205th St., 240 N. Y. 68, 147 N. E. 361, 362.

[43]Hobart v. Hall, 174 Fed. 433, 451.

[44]St. Anthony Falls Water-Power Co. v. St. Paul Water Comrs., 168 U. S. 349, 368, 42 L. ed. 497, 18 Sup. Ct. 157.

[45]Floyd County v. Allen, 190 Ky 532, 227 S. W. 994.

vate lands to gain access to the shore below the high-water mark, at which line private ownership terminates,[46] but in the absence of an otherwise controlling local law limiting the rights of a riparian owner upon a navigable river, he has in addition to the rights common with the public, a property right of access from the front of his land to the navigable part of the stream.[47] In Washington the statutes specify that a conveyance by the state of uplands upon a natural navigable waterway grants no right of any kind either in land below high water or in, to, or over the water; except the limited preferential right to purchase the shoreland if the state concludes to sell.[48] In California the local law is approximately the same,[49] and in Alaska the right of access is regarded as an easement, effective only if the upland owner has need of access.[50] The right of access includes the right to wharf out to deep water, subject to the general rules imposed by the legislature,[51] and the owner of upland adjoining flats has the privilege of wharfing out and erecting stores and piers over and upon such soil and using it for any purpose that does not interfere with navigation.[52] This right is subject only to the superior right of the state that may improve navigation and better the channels of commerce for the benefit of the public without compensation for damages to the rights of the riparian owners.[53] However the riparian rights of an up-

[46]Kirwin v. Mexico Petroleum Co., 267 Fed. 460; Hobart-Lee Tie Co. v. Grabner, 206 Mo. App. 96, 219 S. W. 975; Guilliams v. Beaver Lake Club, 90 Ore. 13, 175 Pac. 437.

[47]United States v. River Rouge Imp. Co., 269 U. S. 411, 418, 70 L. ed. 339, 46 Sup. Ct. 144.

[48]Seattle v. Oregon &c. R. Co., 255 U. S. 56, 65 L. ed. 500, 41 Sup. Ct. 237.

[49]Koyer v. Miner, 172 Cal. 448, 156 Pac. 1023; Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23.

[50]Alaska Juneau Gold Min. Co. v. Northern Lbr. Mills Co., 5 Alaska 269.

[51]Philadelphia v. Commonwealth, 284 Pa. 225, 130 Atl. 491.

[52]Walz v. Bennett, 95 Conn. 537, 111 Atl. 834, 835.

[53]Hinkley v. State, 202 App. Div. 570, 195 N. Y. S. 914. See Nirdlinger v. Stevens, 262 Fed. 591-598, note 64. See § 291, infra.

land owner can only be damaged by the state without compensation if public necessity demands it for the promotion of navigation and commerce,[54] and where the damage is caused by the construction of a subway beneath a pier, it has been held that the city was liable, for such use was not for the furtherance of navigation or commerce upon the water.[55]

[§ 291.] (C) Right to Make and Reclaim Land Under Tidal Water.—In a few jurisdictions it is recognized that by virtue of long prevalent custom, the adjacency of one's land to a stream of tidal water invests him with the license to fill in and wharf out over the public domain in front of his land to such an extent as does not interfere with the public rights of fishing and navigation, and that this license when executed becomes irrevocable and confers on the riparian owner a good and indefeasible title to land thus reclaimed.[56] Although it is recognized that in the absence of legislation as to the manner of occupancy of land below water, a riparian owner may, by virtue of his ownership, connect his upland with deep water by artificial means, the exercise of the right is at all times subject to regulation,[57] and it is generally held that the right of reclamation is subject to statutory authorization,[58] or dependent upon a grant from the state as authorized by the statute,[59] and that the riparian owners have no right to fill or place obstructions between high and low water without the expressed authority of the state.[60] Statutes conferring upon riparian owners

[54]Burns v. New York, 178 App. Div. 615, 165 N. Y. S. 615, 621.

[55]New York Dock Co. v. Flinn-O'Rourke Co., 121 Misc. 155, 200 N. Y. S. 347.

[56]New Jersey Zinc &c. Co. v. Morris Canal &c. Co., 44 N. J. Eq. 398, 15 Atl. 227; Norwalk v. Podmore, 86 Conn. 658, 86 Atl. 582; State v. Korrer, 127 Minn. 60, 148 N. W. 617.

[57]State v. Illinois Cent. R. Co., 33 Fed. 730, 755.

[58]Panama Ice &c. Co. v. Atlanta &c. R. Co., 71 Fla. 419, 71 So. 608.

[59]Hoboken v. Pennsylvania R. Co., 124 U. S. 656, 684, 31 L. ed. 543, 8 Sup. Ct. 643.

[60]Black v. American Int. Corp., 264 Pa. 260, 107 Atl. 737.

the right to acquire title to land by filling are to be strictly construed, and general terms should not be extended to include specific rights not clearly included within the language.[61] Where the statutes give the riparian owner a preemptory right and specify that "no grant or license shall be granted to any other than the riparian proprietor until six calendar months after the riparian proprietors shall have been personally notified in writing by the applicant for such grant or license etc—"a grant made prior to the expiration of the six months is void.[62] In New Jersey where it is recognized that the line of high water is ambulatory, shifting as the sea advances or recedes, a grant from the state conveying land below high water to a party other than the upland owner, does not give the former the title to land acquired by accretion or reliction, for the latter, although he loses the license to wharf out, or fill in,[63] still retains his full riparian rights including those of accretion, and the former can not fill in his land beneath the water until he has recompensed the upland owner.[64] Such a grant from the state merely gives the grantee a license to make the land when he has extinguished the riparian rights of the upland owners. In Maryland by the statutes of 1862, 1888 and 1904 no patent thereafter issued impairs or affects the rights of riparian proprietors. It has been held that these acts prevent the state from intercepting the riparian owner's right to make future improvements in front of his land,[65] and in a later case that a patent could not be issued for land under navigable water.[66] However the right to improve out until actually availed of, is subject

[61]Katzenbach v. Armstrong Cork Co., 99 N. J. Eq. 32, 132 Atl. 324.

[62]Shamberg v. Board of Riparian Comrs., 72 N. J. L. 132, 60 Atl. 43.

[63]Hoboken v. Pennsylvania R. Co., 124 U. S. 656, 691, 31 L. ed. 543, 8 Sup. Ct. 643.

[64]Nirdlinger v. Stevens, 262 Fed. 591, 598.

[65]Brady v. Baltimore, 130 Md. 506, 101 Atl. 142.

[66]Linthicum v. Shipley, 140 Md. 96, 116 Atl. 871, 23 A. L. R. 754.

to the right of the United States to use soil under water in aid of navigation without proprietor's consent, and without compensation.[67] Likewise the common law right of an upland owner to acquire land by reclamation has been held to be a license or privilege which is subject to withdrawal or revocation by the state if not previously acted upon.[68] In a few jurisdictions it is held that riparian rights including the privilege to wharf out and to fill in are property rights and can not be taken away without the paying of just compensation therefor.[69] An act granting the right to fill in lands under water and to thereby acquire title to the same gives an inchoate, vested interest in the lands described which is a property right, in the nature of a franchise, and of which, unless forfeited, the grantee can not be deprived without compensation,[70] but title does not vest in the grantee until he has actually reclaimed and raised the land above the water.[71] Where the right of a riparian owner to gain land by filling in is regarded as dependent upon legislative grant or permission, one reclaiming without such acquires no title,[72] but where the reclamation is lawful the made land becomes an integral part of the owners upland and his title will extend to the new high water mark,[73] for when the sovereign grants to an owner of the adjacent upland the title to lands under navigable waters, such owner may, subject to the limitations imposed by the United States Constitution, fill in such lands, make upland out of them and extinguish the public rights in them.[74] In Cali-

[67]Hawkins Pt. Light v. House, Fed. Cas. 3987.

[68]Katzenbach v. Armstrong Cork Co., 99 N. J. Eq. 32, 132 Atl. 324.

[69]Union Depot St. R. &c. Co. v. Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789.

[70]First Constr. Co. v. State, 221 N. Y. 295, 116 N. E. 1020.

[71]Commodores Point Term Co. v. Hudnall, 3 Fed. (2d) 841; Long Dock Co. v. State Board of Assessors, 89 N. J. L. 108, 97 Atl. 900.

[72]Hinkley v. State, 234 N. Y. 309, 137 N. E. 599.

[73]United States v. Mission Rock Co., 189 U. S. 391, 47 L. ed. 865, 23 Sup. Ct. 606; Lockwood v. New York &c. R. Co., 37 Conn. 387.

[74]Tiffany v. Oyster Bay, 234 N. Y. 15, 136 N. E. 224, 24 A. L. R. 1267. See also § 299, infra.

fornia the upland owner is entitled to accretions from natural causes alone, and all artificial fills belong to the state or its grantees.[75]

[§ 292.] (D) The Right to Accretion.—(1) General. —"Alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous—whether it is the effect of natural or artificial causes makes no difference,"[76] and accretion as "the process of gradual and imperceptible increase of land, caused by the deposit of earth, sand, or sediment thereon by contiguous waters,"[77] but ordinarily the terms are without differentiation.

Reliction (or dereliction) is the term applied to land that has been covered by water, but which has become uncovered by the imperceptible recession of the water,[78] and although technically speaking, land uncovered by a gradual subsidence of water is not an "accretion" but a "reliction," the terms are often used interchangeably, and the law relating to accretions applies in all its features to relictions.[79]

Batture in its grammatical sense as a technical word, and in common parlance, is an elevation of the bed of a river, under the surface of the water.[80] "It is however sometimes used to denote the elevation of the bank when it has risen above the surface of the water, or is as high as the land on the outside of the bank." In this latter sense it is synonymous with alluvion, and means in common law language land formed by accretion.[81]

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[75]Los Angeles v. Anderson, (Cal.) 275 Pac. 789.

[76]County of St. Clair v. Lovingston, 23 Wall. (90 U. S.) 46, 68, 23 L. ed. 59.

[77]In re Broadway, 137 App. Div. 652, 122 N. Y. S. 281, 283.

[78]Martin v. Busch, 93 Fla. 535, 112 So. 274.

[79]Hanson v. Thornton, 91 Ore. 585, 179 Pac. 494.

[80]State v. Richardson, 140 La. 329, 72 So. 984.

[81]New Orleans v. Morris, 18 Fed. Cas. 10, 182, 3 Woods 103.

[§ 293.] (2) **Ownership of Accretions.**—It is the established rule that a riparian owner of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary whether his land be increased or diminished,[82] because as the riparian proprietor is subject to the possible loss by erosion, he should be compensated by the gain from accretion due to natural causes,[83] and to retain his riparian right of access to the water and to have his shores washed by the same the title must follow the accretion.[84] Land owned by the Federal Government[85] or a municipal corporation[86] is subject to the same rules regarding accretions as that owned by private proprietors.

The right to accretions is recognized as having some of the attributes of property, and while it must be enjoyed subject to the rights of the public, the riparian owner can be deprived of this qualified right only in accordance with established law, and if necessary that it be taken for the public good, upon due consideration.[87]

The right of a riparian proprietor to future accretions will be protected by injunction,[88] and such owner may have cause of action against one who changes the current so as to prevent future deposits,[89] and may restrain the removal of sand and gravel from the beach below high water, for such removal is an interference with his right as owner to have title attached to land formed by accretion.[90]

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[82]Philadelphia Co. v. Stimson, 223 U. S. 605, 624 56 L. ed. 570, 32 Sup. Ct. 340.

[83]Sea Coast R. E. Co. v. American Timber Co., 92 N. J. Eq. 219, 113 Atl. 489.

[84]St. Louis v. Rutz, 138 U. S. 226, 246, 34 L. ed. 941, 11 Sup. Ct. 337.

[85]Bigelow v. Herrink, 200 Iowa 830, 205 N. W. 531.

[86]Jones v. Soulard, 24 How. (65 U. S.) 41, 16 L. ed. 604.

[87]Hohl v. Iowa Cent. R. Co., 162 Iowa 66, 143 N. W. 850. See § 291, supra.

[88]Hohl v. Iowa Cent. R. Co., 162 Iowa 66, 143 N. W. 850.

[89]Freeland v. Pennsylvania R. Co., 197 Pa. 529, 47 Atl. 745.

[90]King v. North Chesapeake Beach Land &c. Co., 143 Md. 693, 123 Atl. 455.

Where the riparian boundary is the high water line of the sea, a grantee of the state who acquires title to land below the highwater, has no right to the accretions which belong to the upland owner whose outer boundary recedes and advances as the land erodes or alluvion forms from the shore,[91] for where a deed calls for the ocean as a boundary, the land conveyed extends to the ocean for all time whether the high water recedes or encroaches by natural accretions or erosions.[92] In Michigan where the land outside of the meander line along the shores of the Great Lakes belongs to the state, changes in conditions due to accretion and reliction do not affect the title or rights of the state or the riparian owners as to land under the water when the state was admitted to the Union; but the state can not put land gained by accretion or reliction to any use that will infringe upon the riparian owners right to reach navigable water for any lawful purpose, including the erection of a wharf.[93]

A riparian owner is entitled to all lands made by accretion or reliction in front of his property and contiguous thereto according to his shore line, but his right can not extend laterally so as to exclude other riparian owners above or below from access to the river.[94] To give title to the alluvion the accretion must begin from the land of the riparian owner claiming it, and not from some other point so as to finally reach his shore or bank.[95] Therefore in order for a riparian owner whose title extends only to the bank or to low water to acquire title to land by accretion, the formation must grow from and be added to his shore line, the main land;[96] and where the riparian pro-

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[91]Nirdlinger v. Stevens, 262 Fed. 591.

[92]Lambert v. Vare, 88 N. J. Eq. 81, 101 Atl. 726.

[93]Kavanaugh v. Baird, 241 Mich. 240, 217 N. W. 2.

[94]Widdicombe v. Rosemiller, 118 Fed. 295.

[95]Hohl v. Iowa Cent. R. Co., 162 Iowa 66, 143 N. W. 850.

[96]Wilson v. Watson, 144 Ky. 352, 138 S. W. 283.

prietor's title carries only to highwater, the accretion must begin at highwater.[97]

[§ 294.] (3) **Islands.**—The title to an island which springs up in the bed of a navigable stream vests in the owner of that part of the bed upon which the island forms and accretions to the island vest in the same.[98] Therefore where the riparian owners have fee to shore only, and the bed of the stream is vested in the state, an island formed by accretion belongs to the state and not to the riparian owner, and when by accretions such an island is attached to the mainland, the owner of the shore is not entitled to the island but only to such alluvion as formed from his land.[1]

[§ 295.] (4) **Effect of Erosion.**—"Where the lands of a riparian owner have been slowly and gradually eroded by a navigable stream, and the river has usurped and taken up the location of said land, the riparian owner of the land at the newly formed river bank becomes entitled to accretions that may thereafter be formed against said bank, even though they should extend over the same territory where lands of a former riparian owner had been located before the erosion took place."[2] Where the stream is navigable, and the fee in the bed is in the state, it is evident that a riparian owner loses his right in the land when the waters of the stream cover it, but the rule is in actuality based on another foundation. It is recognized that to hold otherwise would result in intolerable confusion and public inconvenience, would put an end to riparian improvements, for no riparian owner could be certain of his tenure, title and right of access to water, and would raise a doubt as

[97]Wallace v. Driver, 61 Ark. 429, 33 S. W. 641.

[98]State of Iowa v. Carr, 191 Fed. 257.

[1]Cooley v. Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300.

[2]Bone v. May (Iowa), 225 N. W. 367, quoting Payne v. Hall, 192 Iowa 780, 185 N. W. 912.

to whether the riparian right gained by the washing away of property in front were a permanent legal right or a mere temporary privilege.[8]

This is one of the many disputed points regarding riparian boundaries, and viewed from the standpoint of pure law, the settlement of ownership of accretions over land which has been entirely under water for a period would appear to depend upon two factors,—(1) the ownership of the bed of the stream, and (2) the point of beginning of the accretion. Where the bed of the river is held by the state, the owner whose land is eroded has lost all title, and therefore all right of accretion. Where the title to the bed of the stream is in the riparian proprietor, whether the stream be navigable or non-navigable, accretions which form as sand bars and rise above the waters as islands do not belong to the new riparian owner, for they have not grown from his bank; and as they first attached to land owned by the former riparian proprietor they should belong to him.

This theory is admittedly difficult to apply, for it may involve the determination of the manner in which a given accretion formed, or the fixing upon the ground the line where simultaneous accretions from the shore and bed meet. On navigable streams the reason for the rule is worthy of consideration, but the expense of protecting land from erosion is often too great for a property owner to bear, and were it not for the fact that he stands to gain by accretion, the law as it is generally applied would be most unfair. Although it is impossible to give wholehearted support to this rule, for human sympathy is always with the individual who has suffered loss, it is undoubtedly for the best interests of the public at large, that tenure of acquired riparian rights be assured.

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[8] In re Buffalo, 206 N. Y. 319, 99 N. E. 850, 853.

Where the stream is non-navigable many of the reasons for the rule do not exist, and in South Dakota, although it is frankly acknowledged as contrary to ancient precedent, it has been held that the accretion belongs to the owner whose property has been entirely eroded if he can reestablish the boundaries by a survey upon the remade land.[4]

In Tennessee the court has held that it is not every disappearance of land by erosion or submergence that destroys the title of the true owner or enables another to acquire it; for the erosion must be accompanied by transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such lapse of time as will preclude the identity of the property from being established upon its reliction;[5] but the United States Supreme Court in reversing this case took exception to this modification of the common law rule[6] and regarded it as a misapplication of the sound doctrine that land destroyed by the violence of the sea during a storm, when restored by reliction, belongs to the former owner, if capable of identification.[7]

In Illinois where the fee to the bed of a navigable stream is in the owners of the adjoining land, it has been held that an island which was submerged for a considerable time, but which eventually reappeared and was capable of identification by its original description belonged to the original owner, for his fee included the land under the water, and the island reformed upon his land, and furthermore the considerations regarding the stability of riparian rights had no application;[8] but in Missouri where the land of the riparian owner is limited to low water, such owner is not entitled to island formed within his former bound-

[4]Erikson v. Horlyk, 48 S. Dak. 544, 205 N. W. 613.

[5]State v. Muncie Pulp Co., 119 Tenn. (11 Cates) 47, 104 S. W. 437, 458.

[6]Cissna v. Tennessee, 246 U. S. 289, 296, 62 L. ed. 720, 38 Sup. Ct. 306.

[7]Arkansas v. Tennessee, 246 U. S. 158, 175, 62 L. ed. 638, 38 Sup. Ct. 301, L. R. A. 1918D, 258.

[8]Randolph v. Hinck, 277 Ill. 11, 115 N. E. 182.

aries after his land has been washed away, for the accretion attached to the bed of the stream is upon land gained by the state by the erosion.[9]

The general rule denying the owner of completely submerged land the right to accretion does not apply where sales are made by reference to a plat showing the water line as passing through a certain block and the land under water as divided into blocks and streets. The subdivider in this case is regarded as retaining all rights and interests to the lots under water, and the mere fact that a shore block owned by him is submerged and an adjacent block which he had previously conveyed became riparian, will not overcome this,[10] for the plat constitutes effective notice of his separation of the riparian rights from the upland blocks, and it is always permissible for a riparian owner to make such separation and to convey land bounding upon water to one grantee, and to retain in himself or grant to another the right to reclaimed land or to accretion.[11]

[§ 296.] (5) Effect of Artificial Aids.—The right to accretion is conceded to the riparian owner as an offset to the loss by erosion, and as the latter is produced by natural forces without artificial aid, the former must be accomplished likewise,[12] and as a general rule additions to land fronting on bodies of water caused by artificial means employed by the upland owner do not come under the general rules as to ownership of accretions formed by purely natural causes,[13] but where the accretion is due in part to erection of artificial structures by the owner of adjacent property, with no collusion or connivance on the part of the owner and assented to by the state, the law of accre-

[9]Cox v. Arnold, 129 Mo. 337, 31 S. W. 592.

[10]Gilbert v. Eldridge, 47 Minn. 210, 49 N. W. 679, 13 L. R. A. 411.

[11]Hobart v. Hall, 174 Fed. 433, 459.

[12]Sea Coast R. E. Co. v. American Timber Co., 92 N. J. Eq. 219, 113 Atl. 489.

[13]Menominee River Lbr. Co. v. Seidl, 149 Wis. 316, 135 N. W. 854.

tion applies, and the riparian owner acquires title to all alluvion in front of his property.[14] Furthermore the erection of structures or the employment of methods by the riparian owner that accelerate the natural accretion do not overcome the operation of the law.[15] In general, accretions can not be gained by filling,[16] for such operations are in the nature of reclamations and must be made in compliance with the statutory requirements.[17]

[§ 297.] **(6) Apportionment of Accretion.**—The courts have recognized that it is impossible to formulate a general concrete rule for the apportionment of accretion. "The principle to work by is, that when practical, each owner is to have his full shore front, and when this is not practical, he is to have his ratable part of such front."[18] Where the primary value of the riparian rights is that of access to navigable water, and the frontage is useful for forming landing places and docks, the principle of prorating the new frontage according to the old shore line is rational, and its assures each riparian owner his proper share in future accretions. This method will not necessarily be abandoned because of the unequal distribution of the area of the alluvion resulting thereby,[19] but nevertheless quantity is a factor to be considered.[20] The side lines of the upland property may be extended if the apportionment is fair,[21] but their direction does not necessarily determine the courses of the side lines over flats or accretions and may be disregarded.[22] The dividing lines across the alluvion

[14]Brundage v. Knox, 279 Ill. 450, 117 N. E. 123.

[15]Kansas v. Meriwether, 182 Fed. 457, 463.

[16]In re Driveway, 46 Misc. 157, 93 N. Y. S. 1107.

[17]See § 291, supra.

[18]Nirdlinger v. Stevens, 262 Fed. 591, 602, quoting Beasley, C. J., Delaware L. R. Co. v. Hannon, 37 N. J. L. 276.

[19]Hathaway v. Milwaukee, 132 Wis. 249, 111 N. W. 570, 112 N. W. 455, 122 Am. St. 975, 9 L. R. A. (N. S.) 778.

[20]Deerfield v. Arms, 17 Pick. (34 Mass.) 41, 28 Am. Dec. 276.

[21]Gorton v. Rice, 153 Mo. 676, 55 S. W. 241.

[22]Curtis v. Francis, 9 Cush. (63 Mass.) 427.

are commonly laid down by connecting the extremities of the upland sides at the old shore with the point of division on the new shore as fixed by proportion.[23] There is considerable authority for dividing the accretion by dropping perpendiculars from the extremities of the upland side lines at the old shore to the general line of the new shore or the ordinary line of high water.[24] This is logical where the construction of docks is anticipated.

Where coves exist a base line is taken across the mouth, and if it is not practical to run the side lines over the accretion at right angles to the base, the latter is divided proportionately, and the points of division connected with the extremities of the upland lines.[25] Special cases arising because of the configuration of the land must be considered according to the circumstances.[26] Due regard must always be given to the fact that the interested parties may agree upon a division regardless of their legal rights.[27] Where a plat of land adjacent to the shore has been laid down and the streets extended to low water, and erosion had carried the shore line back into the plan; the lands subsequently formed by accretions of the sea upon a convex shore, are bounded, not by lines spreading fanwise from the upland boundaries perpendicular to the curve of the shore, but by the extension of the street lines and the plan over the accretion as shown on the original plat.[28] (See Fig. 56.)

[23]Hathaway v. Milwaukee, 132 Wis. 249, 111 N. W. 570, 112 N. W. 455, 122 Am. St. 975, 9 L. R. A. (N. S.) 778.

[24]Manufacturers Land &c. Co. v. Board of Commerce & Nav., 98 N. J. L. 638, 121 Atl. 337; Allen v. Wood, 256 Mass. 343, 152 N. E. 617; Reichert v. Ellis Ferry Co., 184 Ky. 150, 211 S. W. 403; Bay City Gas Light Co. v. Industrial Works, 28 Mich. 182.

[25]Emerson v. Taylor, 9 Greenl. (9 Maine) 42, 23 Am. Dec. 531; Ashby v. Eastern R. Co., 5 Metc. (46 Mass.) 368, 38 Am. Dec. 426; Nott v. Thayer, 15 N. Y. Super. Ct. 10.

[26]Stark v. Meriwether, 98 Kan. 10, 157 Pac. 438. See note, 21 L. R. A. 776; 25 L. R. A. (N. S.) 257; Clark's Boundaries, Chap. XIII (1922).

[27]McCoy v. Paxton, 156 Iowa 194, 134 N. W. 1091.

[28]Stevens v. Arnold, 262 U. S. 266, 67 L. ed. 974, 43 Sup. Ct. 560; Nirdlinger v. Stevens, 262 Fed. 591.

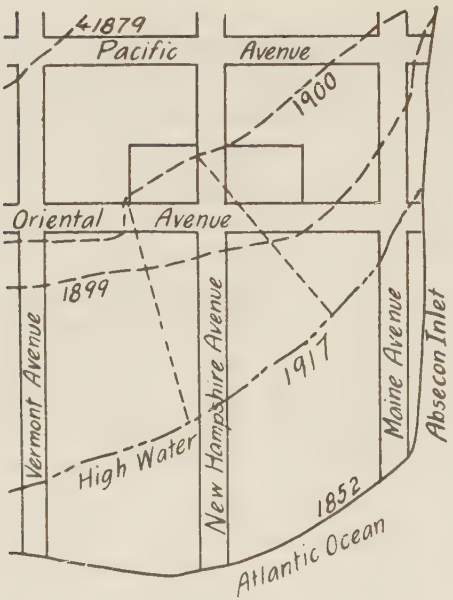

Fig. 56.

In Wisconsin[29] where a city had accepted a voluntary grant of a strip of land for a street, terminating on navigable water, it was held that upon apportionment the city was entitled to its share so that the right to an easement for the street will extend through the alluvion to the water. This is logical, but if adhered to rigidly may result in an extension of the street which is useless for the ordinary highway purposes. The manner of the dedication should not affect the apportionment, and the rule followed by the United States Supreme Court in extending the street over the accretion without contracting its side lines has much to commend it, for as set forth in the consideration of excess and deficiency[30] the public character of the street alone entitles it to preference.

[29]Hathaway v. Milwaukee, 132 Wis. 249, 111 N. W. 570, 112 N. W. 455, 122 Am. St. 975, 9 L. R. A. (N. S.) 778.

[30]See § 219, supra.

[§ 298.] (E) Effect of Avulsion.—The gradual and natural deposition of alluvion by the process of accretion is to be distinguished from avulsion[31] which is the sudden and rapid change of the channel of a stream,[32] and "if instead of a gradual and progressive change of its bed, the river by accident merely natural, turns entirely out of its course and runs into one of the two neighboring states, the bed which it has abandoned becomes thenceforth their boundary, and remains the property of the former owner of the river, the river itself is, as it were, annihilated in all that part while it is reproduced in its new bed and there belongs only to the state in which it flows."[33]

The principle that avulsion works no change of boundary and that the same whether state or private remains in the old channel is universally recognized,[34] but the differentiation between accretion and avulsion is often misunderstood, due largely to the new tests which have been applied in recent cases to define the latter. In the early cases the time element appears to be the primary if not the only factor to be considered. "In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witness may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether this is the effect of natural or artificial causes makes no difference."[35]

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[31]Oklahoma v. Texas, 268 U. S. 252, 69 L. ed. 937, 45 Sup. Ct. 497.

[32]Veatch v. White, 23 Fed. (2d) 69.

[33]Nebraska v. Iowa, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. 396; Vattel Droit des Gens, 1 C. 22, § 270.

[34]Oklahoma v. Texas, 260 U. S. 606, 636, 67 L. ed. 428, 43 Sup. Ct. 221, citing Arkansas v. Tennessee, 246 U. S. 158, 173, 62 L. ed. 638, 38 Sup. Ct. 301.

[35]County of St. Clair v. Lovingston, 23 Wall. (90 U. S.) 46, 68, 23 L. ed. 59, cited in Jefferis v. East Omaha L. Co., 134 U. S. 178, 193, 133 L. ed. 872, 10 Sup. Ct. 518.

In Nebraska v. Iowa,[36] is found another test. "In the very uncommon case called avulsion, when the violence of the stream separates a considerable part from one piece of land and joins it to another, *but in such a manner that it can still be identified,* the property of the soil so removed naturally continues vested in its former owner."

In the application of this test to the Missouri River it was noted that although the bank caved suddenly, it disintegrated in the water and was deposited at undeterminable locations on either shore miles below the point of origin, and the movement failed to constitute a sudden visible transfer of solid earth from one shore to the other in a manner that would permit the identification of the land. It was further noted that although the caving of the bank was instantaneous and obvious, the building up of the opposite bank was imperceptible and failed to satisfy the time test. On the basis of these facts the court held, "The only thing which distinguishes this river (the Missouri) from other streams, in the matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things works no change in the principle underlying the rule of law in respect thereto" and ruled "Our conclusions are that notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and on to the other, the law of accretion controls on the Missouri River as elsewhere; and not only in respect to the rights of individual land owners, but in respect also to the boundary lines between States."

In Oklahoma v. Texas,[37] where it was noted that the changes resulting from the natural and gradual process of accretion "are rather pronounced on the Red River,[38]" it was likewise held that the time element is but one factor

[36]143 U. S. 359, 366, 36 L. ed. 186, 12 Sup. Ct. 396, quoting Vattel, Book 1, C. 22, §§ 268-270.

[37]260 U. S. 606, 67 L. ed. 428, 43 Sup. Ct. 221.

[38]Oklahoma v. Texas, 268 U. S.

in the differentiation between accretion and avulsion, and that the manner in which the change occurs is conclusive.

The decisions of the Supreme Court establish that in the differentiation between accretion and avulsion—

(a) Due regard must be given to the speed of the accretion as well as to the rapidity of the tearing down of the bank; and
(b) That there must be conclusive evidence that the earth forming the new bank originated in the bank torn down.

The natural currents of a river, even when meandering at a temporary level, render impossible the satisfaction of the second requirement and confine the rule concerning avulsion to situations where a stream leaves its old bed and creates a new one, as occurred on the Missouri in the vicinity of Island Precinct on July 5, 1867. In December of 1904 the United States Supreme Court held that under these circumstances the state boundary followed the center line of the old channel as it was before the avulsion.[39] The presumption is always in favor of accretions as against avulsion.[40]

VI. POWER OF STATE TO DISPOSE OF PUBLIC RIGHTS.

[§ 299.] There is but a limited amount of riparian property in the United States to meet the increasing recreational and commercial demands. For this reason the right of the state to make unconditional grants of shore properties to private individuals is important. It has been noted that subject to the paramount right of Congress to control navigation so far as may be necessary for com-

252, 256, 69 L. ed. 937, 45 Sup. Ct. 497.

[39]Nebraska v. Missouri, 196 U. S. 23, 49 L. ed. 372, 25 Sup. Ct. 155.

[40]Bone v. May (Iowa), 225 N. W. 367.

merce, the respective states may use or dispose of lands underlying navigable waters as they choose subject to the rights of the public.[41] It is rightly maintained that the trust in which the title to lands under navigable water is held, is governmental in its nature and can not be wholly alienated by the state,[42] but the unqualified stand that the state in its sovereign capacity is without power to convey or curtail the rights of its people in lands under navigable water[43] is not sound, for it would at once preclude the possibility of private enterprise in the development of port facilities. The question involves economic as well as legal factors, and the better decisions recognize that development often demands the sacrifice of individual rights for the betterment of the public interests. These stress that while the legislature, as representatives of the people, may grant the soil in fee simple, confer an exclusive privilege in tidewater, or authorize a use inconsistent with the public right, the conclusion that the public rights are thus extinguished can only be reached upon clear evidence that such effect was the intention of the legislature, and that the action was taken with the public's interests in mind.[44] Facts must be faced, and it must be acknowledged that the public needs protection against the political rings which from time to time attempt to rob the public of their natural resources. Therefore the New York opinion[45] which states that the state, except for the limitations imposed by the Federal Constitution has power to grant the title to lands under water conditionally or unconditionally, and that this power may be exercised through their commissioners or other officers upon whom it is conferred by statute, while apparently from the citations therein given is good law,

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[41]See § 281, supra.

[42]Brickell v. Trammell, 77 Fla. 544, 82 So. 221.

[43]Lake Sand Co. v. State ex rel., 68 Ind. App. 439, 120 N. E. 714.

[44]Appleby v. New York, 271 U. S. 364, 381-399, 70 L. ed. 992, 46 Sup. Ct. 569.

[45]People v. Steeplechase Park Co., 218 N. Y. 459, 113 N. E. 521.

should be qualified by the better decision of Frazee Milling Co. v. State.[46] This decision clearly states that although the determination as to whether or not the granting of an exclusive privilege in navigable rivers or waters or the authorization of a use inconsistent with the public right is in furtherance of the public weal rests solely upon the legislature, such rights and privileges can only be conferred to individuals by the legislature when acting in the public interest.

Unquestionably Justice Benedict of the Kings County Supreme Court had this in mind in his opinion in Aquino v. Riegelman,[47] where a beach for recreational purposes was involved, and he refused to follow the decision set down in People v. Steeplechase Park Co.,[48] although when the case came before the Appellate Division of the Supreme Court the learned judges on that bench did not concur in this particular.[49]

There is certain to be conflict because the question is one of policy as well as law, and the courts rightly hesitate to infringe upon the rights and field of the legislative branch of the government. Yet now and then the necessity of a check is so apparent that more than law enters into an opinion. Nevertheless the courts have good authority to safeguard the public's limited shore land, for the Supreme Court of the United States has held that the state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties except in instances of parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of

[46]122 Misc. 545, 204 N. Y. S. 645.
[47]104 Misc. 228, 171 N. Y. S. 716.
[48]218 N. Y. 459, 113 N. E. 521.
[49]People ex rel. Aquino v. Riegelman, 187 App. Div. 896, 173 N. Y. S. 917.

the public's interest in the lands and waters remaining, than it can abdicate its police power.[50]

Common sense establishes that the question of the power of a state to grant shore lands should depend not upon the legal right of an elective body to grant such property, but upon the interests of the real owners. The reasons for this contention are the same as the foundation of the recognized rule that the land in the bed of a street can not be gained by adverse possession. What is everybody's business is nobody's business, and when the power to grant is innocently delegated to a land commission, the much needed recreational beaches in a metropolitan area would become private property before the situation was realized by the public. It is very essential that the courts devise means to guard against this, and yet not interfere with proper private development, and except in a few instances they appear to have succeeded admirably.

It is significant to observe that in New York the public has awakened to the value of beaches and shore properties. Recently a park commission on Long Island refused what appeared to be a fair and attractive offer for the exchange of a public beach.[51] Regional planning and conservation of natural resources bring these matters before the public, and render it more difficult for the politician to commercialize the recreational beaches or to sacrifice the public's control over the industrial water front or power developments. Men in public life are usually honest, and the general principle that in disposal of riparian property the public control must not be sacrificed and the return must be commensurate with the earnings of the privilege or concession gives the courts ample authority to protect the public, and yet permits the community the advantages of private development where such is desirable.

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[50]Illinois Cent. R. R. v. Illinois, 146 U. S. 387, 453, 36 L. ed. 1018, 13 Sup. Ct. 110.

[51]New York Times, Sept. 22, 1929.

CHAPTER VI.

ESTABLISHMENT.

I. GENERAL.

Section.
305. General.

II. ESTABLISHED LINES DISTINGUISHED FROM MARKED LINES OF ORIGINAL SURVEY.

306. Established Lines Distinguished From Marked Lines of Original Survey.

III. BY AGREEMENT.

307. Necessary Foundation.
308. Limitations.
309. Implied Agreement.
310. Who May Make Agreement.
311. Time and Consideration.
312. Effect.

IV. BY ESTOPPEL.

313. Foundation.
314. Operation—General.
315. Necessary Essentials.
316. The Controlling Factor.
317. Effect of Improvements.
318. Effect of Error or Ignorance of Misleading Party.
319. Effect of Misled Party Having Means of Knowledge.

V. BY PRACTICAL LOCATION.

320. Essentials.
321. Operation.
322. Effect.

VI. RECOGNITION AND ACQUIESCENCE.

323. Foundation.
324. Limitations.
325. Effect.

VII. BY SUBMISSION TO ARBITRATORS.

326. By Submission to Arbitrators.

VIII. BY PRIVATE SURVEY.

327. By Private Survey.

IX. BY STATUTORY PROCEEDINGS.

328. By Statutory Proceedings.

X. FORMAL AGREEMENTS SHOULD BE ENCOURAGED.

329. Formal Agreements Should Be Encouraged.

I. GENERAL.

[§ 305.] Establishment is important for it serves to maintain the status quo, to supply the deficiencies of poor descriptions, and to abort the birth of disputes in regard to old recognized lines, whether they are in conflict with the deeds or not. The application of establishment to a given case is difficult for it may depend upon such factors as the implication of an agreement, the consequences of a party's action, the presumption of an acquiescence, and may involve the party's knowledge or ignorance of the facts, their intentions, the motives of their action, and their responsibilities to one another.

When it is definitely proved that the fence or wall marking the given line is not in harmony with the lines of other improvements which check with their own deed calls, and that at the most it merely represents a line established at some time by the adjoining owners, the matter is primarily one of law, hinging upon the question of establishment. The engineer should then make a situation survey to show that the lines of the original survey contradict the line in question, and, where possible, explain the discrepancy. In all cases the extent of the conflict should be indicated, but no recommendation as to which line is the boundary should be made, and comments should be confined to the statement of facts. To prepare such a plat intelligently the engineer must have a knowledge of the legal principles of establishment.

Furthermore the engineer is often first to find the conflict between an established line and its corresponding deed line. Where boundaries are unsettled such discoveries are likely to start a dispute, for the first impulse of the party encroached upon is to defend the land laid down by his deed calls. It is much easier to prevent a fight than to stop one, and for a party to defer action than to back down from an untenable position. Therefore, if the engineer can explain

the principles of establishment and illustrate them by an abstract application, the militant party may be persuaded to seek legal advice rather than to depend upon rough tactics. When this is accomplished the matter may often be adjusted peacefully, and when they elect to abide by the established line, the position of the new line may be made a matter of record so that the conflict with the deed line is explained and thus overcome.

II. ESTABLISHED LINES DISTINGUISHED FROM MARKED LINES OF ORIGINAL SURVEY.

[§ 306.] Lines fixed by establishment are to be differentiated from those which are proved to be marked lines of an original survey, for the former are local in their effect and are not to be used as a basis of a survey in direct conflict with the deed calls, while the latter are the very best foundation for the reconstruction of the original plat.

This point is well illustrated in the following survey of Lot Three in the accompanying sketch. The deed merely called for adjoiners, and an attempt was made to lay down the line DC from the senior deed out of the entire tract of some six acres. This grant clearly called for the line as beginning one hundred (100) feet from the corner and parallel to First Street, but when it was laid down it ran into flower beds and upon investigation was not parallel to the fence AB′ which was, according to the deeds of both Lots One and Two on a line parallel to First Street, but in fact departed from parallelism five and one-half (5½) feet in two hundred feet. The fence had long been established, but the deed description was clear and certain. The street was monumented, and there could be no error of consequence in laying down its side line. The line DC being unmarked raised the question as to the weight to be given DC′ established with regard to the fence. Was the proper location of the senior grant that laid down by the deed from

the monumented street, and had the senior grantee by long acquiescence in an erroneous fence line lost the triangle ABB′, or should the clear call of his deed for the unmarked

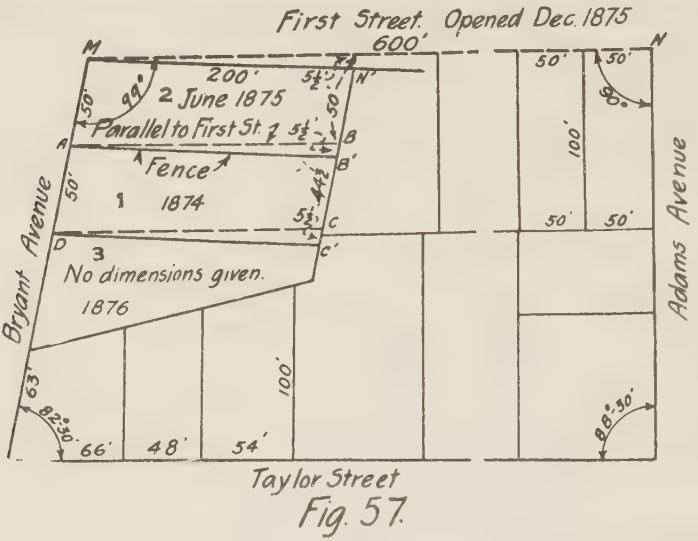

Fig. 57.

line DC as parallel to First Street be ignored and the distances of the senior deed be given control over this call for course and the line laid down as DC′? If the fence was merely on a line established by the acts of the owners of Lots One and Two the first procedure was proper, but if it were a marked line of the original survey the second line of action was to be followed.[1]

The engineer's duty is to lay down the lines in their original location, and no further step was possible until the character of the line AB′ established by the fence was determined. The ordinance defining First Street was looked up, and it was found to be dated subsequent to the deeds to Lots One and Two, but prior to all other conveyances out of the tract. The heirs of the original grantor were then interviewed, and there was found among some old

[1]See § 269, supra.

papers a map of the entire tract. The line MN′ extending indefinitely into the block and the lines AB′ and DC′ parallel to it were shown in black. The line MN with the angles at M and N and the length in conformity with the city map was drawn in red. All the other lot lines in the block were in black and those related to First Street were clearly laid off with reference to MN. From this it was concluded that the fence was built upon a line parallel to the nonexistent street as of date of deed, and that the calls for AB and CD as parallel to this paper street were to be laid down from the fence which was not along a line erroneously established, but along a line of the original survey. As such it controlled the location of DC′, but as merely an established line it placed the fight between the property owners whom it separated.

III. BY AGREEMENT.

[§ 307.] (A) Necessary Foundation.—To establish a line by agreement it is essential that the line be in dispute or that its true location be unknown, and that the agreement shall simply fix and determine the situation and location of the properties the parties already owned.[2] It is not necessary that the line be incapable of ascertainment, for the mere facts that there has been a dispute and that the parties thereto agree upon and settle a line between them is sufficient to bind them, even though it is afterwards learned that the true line could have been found.[3] It is not at all necessary that there be an actual interference as shown by the title papers,[4] and while in some jurisdictions the agreement must be based on an actual dispute,[5] in others this is

[2]Myrick v. Peet, 56 Mont. 13, 180 Pac. 574; Voight v. Hunt (Tex. Civ. App.), 167 S. W. 745.

[3]Aldrich v. Brownell, 45 R. I. 142, 120 Atl. 582; Jenkins v. Trager, 40 Fed. 726. See § 324, infra.

[4]Gayheart v. Cornett, 19 Ky. L. 1052, 42 S. W. 730.

[5]Peters v. Reichenback, 114 Wis. 209, 90 N. W. 184.

not necessary, the element of uncertainty being sufficient.[6] The courts have observed that these settlements are common, approved and encouraged by the courts and ought not to be disturbed, though it may afterwards be shown that they had been erroneously settled, and that convenience, policy, necessity and justice all unite in favor of supporting such an amicable adjustment.[7]

[§ 308.] (B) **Limitations.**—Such an agreement is not within the statute of frauds because the effect of an oral agreement establishing boundary lines is not to pass title to land by parol, but to fix the location of an unascertained or disputed boundary;[8] but if the true line is known, then the transfer of any portion of the land on one side of the line from one owner to the other must be in writing to be valid.[9] Furthermore where the true location is unknown, and the contiguous owners agree on a line that is known not to be the true line, the agreement is void,[10] because it involves a transfer of real estate.[11]

In general where adjoining owners in attempting to find the true line between them by mistake fix upon an erroneous one, they may repudiate the spurious line at any time before the statute of limitations has run.[12] Under these circumstances the agreement is to establish the true line,[13] and an adoption of a line other than the true line is clearly a failure of the purpose of the agreement;[14] but where they

[6]Howatt v. Humboldt Milling Co., 61 Cal. App. 333, 214 Pac. 1009; Price v. DeReyes, 161 Cal. 484, 119 Pac. 893.

[7]Brown v. Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660.

[8]Jones v. Scott, 314 Ill. 118, 145 N. E. 378.

[9]Jenkins v. Trager, 40 Fed. 726; Jones v. Scott, 314 Ill. 118, 145 N. E. 378.

[10]Voight v. Hunt (Tex. Civ. App.), 167 S. W. 745.

[11]Silva v. Azevedo, 178 Cal. 495, 173 Pac. 929.

[12]Hills v. Ludwig, 46 Ohio State 373, 24 N. E. 596.

[13]Benz v. St. Paul, 89 Minn. 31, 93 N. W. 1038.

[14]Wilson v. Stork, 171 Wis. 561, 177 N. W. 878; Purtle v. Bell, 225 Ill. 523, 80 N. E. 350.

merely agree upon a certain line as the true line, they and those claiming under them are bound thereby.[15]

[§ 309.] (C) **Implied Agreement.**—An agreement may be implied as well as expressed. Thus where adjoining lot owners tacitly agree on a division line evidenced by a fence built by one of them, and the second in reliance of this line established by the first builds a dwelling house and other improvements without his right being questioned for thirteen years, the one who built the fence and those claiming under him are estopped to dispute the boundary thus established and acquiesced in.[16]

[§ 310.] (D) **Who May Make Agreements.**—Only owners abutting on a disputed line may make agreements fixing its location,[17] and it has been held that a municipality as well as any other owner may by agreement determine the boundary line of its property.[18] While a mortgagor may make such an agreement, the same will not be binding on the mortgagee or those claiming under him.[19] Location of boundaries of the parties at or before the time of purchase is competent,[20] and the fact that a purchaser of land, holding and claiming ownership thereof, has not paid the consideration therefor, does not invalidate a parole agreement made by him with an adjoining owner, and he and those claiming under him are bound thereby.[21]

[§ 311.] (E) **Time and Consideration.**—An actual agreement in fact, whether by writing or parole takes the place of acquiescence and becomes binding from the time it is made,[22] and acquiescence for the period required by

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[15]McKeon v. Roan (Tex. Civ. App.), 106 S. W. 404.

[16]Deidrich v. Simmons, 75 Ark. 400, 87 S. W. 649.

[17]Hunter v. Malone, 49 Tex. Civ. App. 116, 108 S. W. 709.

[18]Muchenberger v. Santa Monica (Cal.), 275 Pac. 803.

[19]Orr v. Hadley, 36 N. H. 575.

[20]In re Freeman, 189 N. Car. 490, 128 S. E. 404.

[21]Cavanaugh v. Johnson, 91 Cal. 580, 27 Pac. 931.

[22]Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230.

statute is conclusive evidence of a previous agreement, though there may in fact be none,[23] for agreements regarding boundaries differ from adverse possession in that they essentially are friendly settlements regarding disputed and uncertain lines rather than hostile assertions of ownership of the land in controversy, and in that they are effective when sufficient time has elapsed to show the intention, whereas adverse possession is not established until the occupancy has been for the prescribed period.[24] A fence having been maintained as division line between parties and their respective vendors for more than fifteen years will be treated as division line of the lands even though it might not be the true line originally dividing the lands.[25] While a consideration is necessary,[26] the removal of doubt and uncertainty constitutes a consideration sufficient for the agreement to stand on.[27]

[§ 312.] **(F) Effect.**—These agreements are binding upon those making and claiming under them, whether to the true line or not,[28] although not acknowledged and recorded.[29] Furthermore they bind those claiming under an adult who has made such an agreement with the guardian of an infant,[30] when the latter upon becoming of age has acquiesced in the agreement, and are likewise effective between a life tenant and an adjoiner when ratified by the remainderman.[31] An agreement is not binding on one owning

[23]Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230.

[24]Turner v. Bowens, 180 Ky. 755, 203 S. W. 749; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

[25]Peters v. Hendricks, 225 Ky. 722, 9 S. W. (2d) 1076.

[26]Duel v. Bluembke, 154 Wis. 519, 143 N. W. 179; Baker v. Johnson, 79 Ind. App. 413, 138 N. E. 780.

[27]Hoskins v. Morgan, 197 Ky. 736, 248 S. W. 210; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

[28]Young v. Hyland, 37 Utah 229, 108 Pac. 1124. See § 308, supra, note 47.

[29]Samples v. Smyth, 30 Ky. L. 498, 98 S. W. 1047.

[30]Brown v. Caldwell, 10 S. & R. (Pa.) 114, 13 Am. Dec. 660.

[31]Atwood v. Wheat (Ky.), 127 S. W. 511.

an undivided interest who was neither a party to the same nor gave consent;[32] and one of several coowners can not bind the others without their consent for all parties interested in the land must be parties to the agreement.[33] Where several adjacent landowners agree to accept a boundary line as located by a surveyor, each is bound separately, and a breach by one can not destroy the obligation existing between the others,[34] but an agreement between several coowners is not binding on the others unless they consent thereto, and where an agreement is made to apportion the excess in a block, and the failure of one coowner to enter into the agreement results in imposing a deficiency rather than giving a portion of the excess to one of the parties of the agreement, the purpose has failed, and the agreement has no force.[35]

The operation of an agreement can not affect the rights of an adjacent owner whose lands are bounded by the same division line, or might be affected by the proximity of the latter[36] unless he himself is a party to the agreement.[37] Where followed by acquiescence and possession the agreement is concluded, although the boundary line so established is not the original one,[38] for it operates to place beyond future doubt the true line of division.[39] Where improvements are made on the faith of the agreement neither party may repudiate[40] regardless of the prescribed time.[41] Some decisions require that to be effective expenditures must be made on faith of the agreement or that other cir-

[32]Cosgrave v. Donovan, 52 Cal. App. 625, 199 Pac. 808, 810.

[33]Vermont Marble Co. v. Eastman, 91 Vt. 425, 101 Atl. 151.

[34]Corrington v. Pierce, 28 Ill. App. 211.

[35]Smith v. Gilley (Tex. Civ. App.), 135 S. W. 1107.

[36]Whitman v. Dailey, 95 Vt. 454, 115 Atl. 559.

[37]Ilsley v. Kelly, 113 Maine 497, 94 Atl. 939; Ivey v. Cowart, 124 Ga. 159, 52 S. E. 436.

[38]McGovern v. Heery, 159 Iowa 507, 141 N. W. 435.

[39]Loustalot v. McKeel, 157 Cal. 634, 108 Pac. 707.

[40]Deidrich v. Simmons, 75 Ark. 400. 87 S. W. 649.

[41]Price v. DeReyes, 161 Cal. 484, 119 Pac. 893.

cumstances render it inequitable for either party to set up a true boundary,[42] but where there is an actual agreement in fact this is unnecessary.[43]

An agreement followed by a practical location or one adopting an existing location is binding on the parties[44] regardless of the accuracy of the actual location as it may appear from subsequent measurements,[45] nor does it make any difference that a different line had been recognized as the boundary for many years by the predecessors in title of the parties.[46] However a practical location made subject to the subsequent establishment of the true line does not extend to either party any rights by prescription or estoppel[47] until the true boundary line is determined, and a location made by a party without previous agreement with his adjoiner is not binding.[48] A parol agreement establishing a division line may be rescinded or modified by further agreement[49] but where the modifications are not accepted, the original agreement remains in force,[50] or it may be revoked by either party at any time before it is fully executed.[51] If either party is deceived by misrepresentations whether fraudulent or not, the agreed line is not binding.[52]

IV. BY ESTOPPEL.

[§ 313.] **(A) Foundation.**—"Estoppel in pais may be defined to be a right arising from the acts, admissions, or conduct which have induced a change of position in accord-

[42]Fuelling v. Fuesse, 43 Ind. App. 441, 87 N. E. 700.

[43]Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230.

[44]Smith v. Stacey, 68 App. Div. 521, 73 N. Y. S. 1022; Veltmans v. Kurtz, 167 Mich. 412, 132 N. W. 1009, 36 L. R. A. (N. S.) 558.

[45]Dundas v. Lankershim School Dist., 155 Cal. 692, 102 Pac. 925.

[46]Roberts v. Birks, 223 Ill. 291, 79 N. E. 103.

[47]Quinn v. Windmiller, 67 Cal. 461, 8 Pac. 14.

[48]United States v. Murray, 41 Fed. 862.

[49]Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190.

[50]Masterson v. Bockel, 32 Tex. Civ. App. 509, 75 S. W. 42.

[51]LaHue v. Bungenstock, 297 Mo. 577, 249 S. W. 402.

[52]Denton v. English (Tex. Civ. App.), 157 S. W. 264, 171 S. W. 248.

ance with the real or apparent intention of the party against whom they are alleged."[53] An estoppel may arise when a party by his declarations or actions either active or passive permits another to be injured to his benefit. As the establishing of a boundary line is not considered as affecting the title to land, it may be settled by estoppel,[54] which may arise as a matter of deed or record as where both parties claiming under the same plat, neither law or good policy permits either of them to dispute the lines of the survey as actually located on the land, for their deeds effectually debar and estop them from so doing,[55] or by the acts or declarations of a party as where a grantee pointed out a road as the boundary he is estopped from denying the same as such.[56]

[§ 314.] (B) **Operation.** — (1) **General.** — Where a party permits another to build to a certain line which he knows is not the boundary and thereby causes the other to spend money on such improvements, he is estopped from claiming to the true line.[57] A silent party having full knowledge of his own rights who intentionally permits others to be deceived and misled will be precluded from later interposing his claims to the prejudice of the party thus deceived and misled,[58] and it should be noted that "standing by" does not necessarily import actual presence, but implies knowledge under such circumstances as to render it a duty of the possessor to communicate.[59] The party making the misrepresentations is estopped thereby even

[53]Agmar v. Solomon, 87 Cal. App. 127, 261 Pac. 1029, 1033.

[54]Cleveland Cliffs Iron Co. v. Gauthier, 143 Mich. 296, 106 N. W. 862.

[55]Laddonia v. Day, 265 Mo. 383, 178 S. W. 741.

[56]Wilson v. Beck, 160 Iowa 276, 142 N. W. 78.

[57]Benz v. St. Paul, 89 Minn. 31, 93 N. W. 1038.

[58]Titus v. Morse, 40 Maine 348, 63 Am. Dec. 665. See § 318, infra.

[59]Gaddes v. Pawtucket Inst. for Sav., 33 R. I. 177, 80 Atl. 415; Richardson v. Chickering, 41 N. H. 380, 77 Am. Dec. 769.

though there is no actual intention to mislead,[60] and this applies whether the sale is by himself or an adjoiner.[61] The grantee is likewise estopped for such erroneous boundaries represent the basis of his action at the time of the purchase and also a practical location of the grant.[62]

Thus where two grantees of adjacent Lots numbers Seven and Eight respectively, four (4) and five (5) rods wide, purchased with the understanding that Lot Seven was five (5) rods and Lot Eight, four (4) rods, and were actually put in possession of the lots as of such dimensions, the purchaser of Lot Eight was estopped from claiming the extra rod width which originally belonged in that lot. Naturally, for the rule to operate, it is essential that conduct of the purchaser be based on and in reliance upon the erroneous statements.[63]

[§ 315.] (2) **Necessary Essentials.**—The essentials necessary for the operation of establishment by estoppel are (1) that the person claiming the benefit shall have been misled to his injury;[64] (2) that his actions were superinduced by the declarations or actions of the party against whom the estoppel is claimed;[65] (3) that the party whose rights are to be barred shall with knowledge have looked on while the other party subjected himself to expense which he would not otherwise have incurred had he known the line to be in dispute;[66] (4) that the division line is not well ascertained and can not be located by the

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[60]Thompson v. Borg, 90 Minn. 209, 95 N. W. 896.

[61]Ward v. Middleton (Ky.), 124 S. W. 823.

[62]Bolton v. Eggleston, 61 Iowa 163, 16 N. W. 62. See also § 66, supra.

[63]Warden v. Addington, 131 Ky. 296, 115 S. W. 241.

[64]Lehman v. Smith, 40 S. Dak. 556, 168 N. W. 857; Hill v. Collier (Tex. Civ. App.), 135 S. W. 1084; Tripp v. Bagley (Utah), 276 Pac. 912; Cheshire v. McCoy, 205 Iowa 474, 218 N. W. 329.

[65]Harris v. Lewis, 156 Iowa 413, 136 N. W. 674.

[66]Benz v. St. Paul, 89 Minn. 31, 93 N. W. 1038. See also Cottrell v. Pickering, 32 Utah 62, 88 Pac. 696, 10 L. R. A. (N. S.) 404.

plain and unambiguous calls of the deed,[67] for in general the party claiming the estoppel must not only be destitute of knowledge of the state of the facts but also of a convenient and available means of acquiring such knowledge.[68]

[§ 316.] (3) **The Controlling Factor.**—In accord with the second essential necessary for the operation of the doctrine of estoppel, it must clearly appear that the erroneous representations were a controlling factor relied on by the purchaser at the time of purchase,[69] and conversely a party purchasing according to boundaries specifically pointed out and marked on the ground, is estopped to subsequently claim other boundaries to the injury of others, especially where such conform with deed monuments.[70]

[§ 317.] (4) **Effect of Improvements.**—Where improvements are made in reliance of erroneous representations, estoppel acts,[71] although where there is a bona fide mistake, and there is no element of fraud, some decisions are to the contrary on the grounds that the improvements are made under mere license, not subsidiary to a valid grant, and revocable at pleasure.[72] This rule is limited in application,[73] and where licensor joins in the enterprise and participates in the benefit of the improvements does not apply.[74]

[§ 318.] (5) **Effect of Error or Ignorance of Misleading Party.**—There is some conflict in regard to the operation of estoppel where the erroneous statements relied upon are made by mistake or in ignorance. It is universally rec-

[67]Kirkpatrick v. McCracken, 161 N. Car. 198, 76 S. E. 821; Tripp v. Bagley (Utah), 276 Pac. 912.

[68]Sheffield Car Co. v. Constantine Hydraulic Co., 171 Mich. 423, 137 N. W. 305.

[69]Cottrell v. Pickering, 32 Utah 62, 88 Pac. 696, 10 L. R. A. (N. S.) 404.

[70]Bolton v. Eggleston, 61 Iowa 163, 16 N. W. 62.

[71]Colorado County v. Travis County (Tex. Civ. App.), 176 S. W. 845.

[72]Minneapolis Mill Co. v. Minneapolis & St. L. R. Co., 51 Minn. 304, 53 N. W. 639.

[73]Hutchinson v. Wegner, 157 Minn. 41, 195 N. W. 535.

[74]Munch v. Stetler, 109 Minn. 403, 124 N. W. 14, 25 L. R. A. (N. S.) 727, 134 Am. St. 785.

ognized that acquiescence necessitates a knowledge of facts which will enable a party to take effectual action,[75] and therefore, on these grounds it is rightly held that where a land owner in good faith points out to the owner of adjoining land an incorrect boundary line, both parties being ignorant of the true line, he is not estopped from denying such line as the true boundary.[76]

The decisions to the contrary are not in conflict with the principle that one can not waive his rights when ignorant of the same. This is made clear in Titus v. Morse[77] where it was held that where a party ignorant of his rights induces another equally ignorant, by his active interference to pursue a particular course, he is estopped not on the ground of fraud, but on the ground that where one of the innocent persons must suffer, the loss should fall upon the one by whom it was occasioned, for he alone should suffer who brought about the condition by his misrepresentation.[78] It should be noted that it is the active participation of the ignorant party that sets estoppel in operation,[79] and in general, silence of a party ignorant of his rights does not operate to his prejudice,[80] for there has been no action on his part causing the other to suffer.

The particular circumstances of each case have an important bearing as is shown in Brewer v. Boston &c. W. R. Corp.[81] The facts were substantially as follows. "A" by parole agreed with his adjoiner "B" to establish the true boundary between their lands. A line supposedly in this location was laid down, and at the time "B" sold his property to "C", "A" acknowledged to "C" that he claimed no

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[75]Pence v. Langdon, 99 U. S. 578, 25 L. ed. 420.

[76]Cheeney v. Nebraska & C. Stone Co., 41 Fed. 740.

[77]40 Maine 348, 63 Am. Dec. 665.

[78]Hall v. Pratt, 142 Ky. 561, 134 S. W. 900; Dolbeer v. Livingston, 100 Cal. 617, 35 Pac. 328.

[79]Id.

[80]Titus v. Morse, 40 Maine 348. 63 Am. Dec. 665; Decker v. Rucker (Tex. Civ. App.), 202 S. W. 1001.

[81]5 Met. (46 Mass.) 478, 39 Am Dec. 694.

land beyond the line in question. Later when it was discovered to be in error "A" was not estopped from claiming to his true line, for it was held that "C" could have required a warranty.

There is one important element in this case which differentiates it from others. The original parol agreement between "A" and "B" was to fix the true line and at the time "A" confirmed his boundary to "C" he presumably thought he was acknowledging his true line, and as the agreement pertained only to the true line, he was not precluded from denying the line in question when he learned that it was in error. The active participation of "A" clearly brought the case within the ruling laid down in Titus v. Morse,[82] and Hall v. Pratt,[83] but the particular terms of the agreement overcame the application. In Ward v. Middleton,[84] where the dispute arose regarding which fork of a creek was the boundary between two tracts, it was held that the owner who acknowledged to the grantee of his adjoiner that a certain fork was the boundary, was estopped by this action from denying the same, even though he was in error, for there were no circumstances relieving the owner from the consequences of his active participation. In Reisland v. Schick,[85] where the facts were practically identical the court held likewise.

[§ 319.] (6) Effect of Misled Party Having Means of Knowledge.—Although there is some authority to the contrary[86] estoppel does not operate where both parties are equally chargeable with notice of the true boundaries,[87] for one may not wilfully shut his eyes to what he might readily or ought to have known.[88] Thus where both parties

[82]40 Maine 348, 63 Am. Dec. 665.
[83]142 Ky. 561, 134 S. W. 900.
[84](Ky.), 124 S. W. 823.
[85]111 Cre. 42, 224 Pac. 827.
[86]Woodward v. Tudor, 81 Pa. 382.
[87]Goozee v. Grant, 81 Nebr. 597, 116 N. W. 508; Carstensen v. Brown, 26 Wyo. 356, 185 Pac. 567.
[88]Pence v. Langdon, 99 U. S. 578, 25 L. ed. 420.

have equal means of knowledge regarding the true line, each has the right to assume that the other will know that he stood upon his right, and therefore in pursuance of this assumption an owner may erect an ordinary fence without renouncing title beyond it, or warranting his adjoiner in supposing that he had so done.[89]

V. BY PRACTICAL LOCATION.

[§ 320.] (A) Essentials.—Practical location is but an actual designation by the parties on the ground of the monuments and bounds called for by their deeds,[90] and one adjoiner can not make a practical location without the other.[91] Cooperation and agreement between the adjoiners is essential to a practical location, and the mere fact that an adjoiner knew of survey and saw the actual setting of stakes is insufficient to establish a practical location in absence of proof that he agreed to the line or that improvements were made according to the survey.[92]

[§ 321.] (B) Operation.—Where adjoining owners deliberately erect monuments, fences, or make improvements on a line between their lands on the understanding that it is the true line, it amounts to a practical location,[93] but the mere fact that an owner sets his fence within his boundary line does not give his adjoiner the right to the land fenced out,[94] for the circumstances must be considered, and if the fence is merely temporary and erected without the intention of marking the boundary, it can not be regarded as intended as a boundary fence; or if its location is the result of fraud or mistake the parties are not necessarily

[89]Iverson v. Swan, 169 Mass. 582, 48 N. E. 282.

[90]Wells v. Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

[91]Crook County v. Sheridan County, 17 Wyo. 424, 100 Pac. 659.

[92]Hruby v. Lonseth, 63 Wash. 589, 116 Pac. 26.

[93]Perich v. Maurer, 29 Cal. App. 293, 155 Pac. 471.

[94]Sheldon v. Michigan Cent. R. Co., 161 Mich. 503, 126 N. W. 1056.

estopped from claiming to their true line. Nevertheless a practical location may be along a wrong line, and either of the parties so making may be estopped to claiming to the true line,[95] especially when acquiesced in over a long period of years;[96] and while a person is not compelled to fence in all his land, where an owner builds a fence on a line laid out by surveyors it is in a sense a monument which is held out as the true line and which will estop the builders from denying the right of innocent purchasers obtaining land to regard it as such after its establishment for many years.[97] It has been held that where a barn and a fence built on the rear line of a lot encroached on the adjoiner, and upon tearing down the barn a fence was built on the same line, that a practical location was made by acquiescence and that adjoiner was estopped to claim to the true line.[98]

[§ 322.] (C) Effect.—When a practical location is not induced by fraud or mistake, it concludes the parties and their privies,[99] and it has been so held where subsequently after long acquiescence such location was found to vary from the course called for in the deeds and grants under which the parties claimed prior to agreeing to the line.[1] However it has been held that an irregular pasture fence running from tree to tree on or near the line although in a sense was a practical location based on error and, silently acquiesced in, did not preclude either party asserting the ownership of land beyond it to the true line. A practical location made by a mutual grantor is binding on the grantees[2] for it is presumed to be the line mentioned in the deeds.[3]

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[95]Lane v. Jacobs, 166 App. Div. 182, 152 N. Y. S. 605.

[96]Granada v. D'Allesandro, 96 Misc. 468, 160 N. Y. S. 602.

[97]Rippey v. Harrison, 66 Wash. 109, 119 Pac. 178.

[98]Lane v. Jacobs, 166 App. Div. 182, 152 N. Y. S. 605.

[99]Golterman v. Schiermeyer, 125 Mo. 291, 28 S. W. 616.

[1]Laughlin v. Francis, 129 Iowa 62, 105 N. W. 360.

[2]Turner v. Creech, 58 Wash. 439, 108 Pac. 1084.

[3]Herse v. Questa, 100 App. Div. 59, 91 N. Y. S. 778.

VI. RECOGNITION AND ACQUIESCENCE.

[§ 323.] (A) **Foundation.**—In general acquiescence depends on the words, declarations, or silence of the parties thereto, or inferences and presumptions of their conduct[4] and exists where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer that he has waived or abandoned his right. Acquiescence does not presume an agreement, either expressed or implied; but to the contrary an agreement is inferred by acquiescence.[5] Recognition and acquiescence not induced by fraud or mistake and continued for a long period of time afford strong if not conclusive evidence that the line so recognized is in fact the true line,[6] and boundaries may be so established although neither of the parties intended to claim more than his deed gave him.[7]

[§ 324.] (B) **Limitations.**—However mere license or passive acquiescence in an encroachment will not conclude a party,[8] and the maintenance of a fence for the mutual accommodations of both parties although along a line claimed to by one does not necessarily imply acquiescence,[9] especially when the true line could be ascertained from the deeds,[10] and to constitute acquiescence it is essential that the person claiming the benefits shall have been induced by the conduct of the person debarred to have acted to his prejudice.[11] Where the adjoiner is an absentee owner there is

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[4]Dwight v. Des Moines, 174 Iowa 178, 156 N. W. 336.

[5]Keller v. Harrison, 139 Iowa 383, 116 N. W. 327.

[6]Lane v. Jacobs, 166 App. Div. 182, 152 N. Y. S. 605.

[7]Bradley v. Burkhart, 139 Iowa 323, 115 N. W. 597, 130 Am. St. 328.

[8]Scheible v. Hart, 11 Ky. L. 607, 12 S. W. 628.

[9]Martin v. Frazier, 172 Iowa 63, 152 N. W. 14.

[10]Agmar v. Solomon, 87 Cal. App. 127, 261 Pac. 1029.

[11]Bradshaw v. Booth, 129 Va. 19, 105 S. E. 555.

no acquiescence,[12] for one can not acquiesce in a condition without knowledge of the same.[13] The mere existence of a fence between adjoiners is not sufficient to establish a line between them,[14] but long acquiescence will warrant the presumption that the fence is on the line[15] and will only be overcome by clear and satisfactory proof,[16] and such a fence becomes conclusive evidence of the line when the statutory period has elapsed,[17] although it may be erroneously located.[18]

If an owner ignorant of his true boundaries by mistake acquiesces in a line as a boundary, he and his grantees are not thereby precluded from afterwards claiming to the true line,[19] and it has been held that one who has no knowledge that his adjoiner encroaches can not be held to have lost his rights by acquiescence in such occupancy no matter how long continued, for one can not waive or acquiesce in a wrong while ignorant that it has been committed,[20] especially where each party had equal means of ascertaining the correct line.[21] Circumstances may preclude recognition and acquiescence. Thus where adjoining land owners erect a division fence on the supposed boundary under the agreement that when the true boundary is established the fence shall be changed to conform, neither acquires rights against the other by reason of the erection of such fence either upon prescription or estoppel until the true boundary is determined.[22] Where an owner repudiates a line acquiesced in and insists upon a survey he can not

[12]Palmer v. Osborne, 115 Iowa 714, 87 N. W. 712.

[13]Dwight v. Des Moines, 174 Iowa 178, 156 N. W. 336.

[14]Boltz v. Colsch, 134 Iowa 480, 109 N. W. 1106.

[15]Corey v. Ft. Dodge, 118 Iowa 742, 92 N. W. 704.

[16]Corey v. Ft. Dodge, 118 Iowa 742, 92 N. W. 704.

[17]McNichol v. Flynn, 167 App. Div. 646, 153 N. Y. S. 308.

[18]Wolf Brick Co. v. Lonya, 132 Mich. 162, 93 N. W. 251, 102 Am. St. 412.

[19]Ulman v. Clark, 100 Fed. 180; Myrick v. Peet, 56 Mont. 13, 180 Pac. 574.

[20]Connell v. Clifford, 39 Colo. 121, 88 Pac. 850.

[21]Daugherty v. Manning (Tex. Civ. App.), 221 S. W. 983.

[22]Quinn v. Windmiller. 67 Cal. 461, 8 Pac. 14.

thereafter avail himself of estoppel by acquiescence,[23] but if there is no agreement or circumstance binding either party to a survey, such survey will not deny the right to plead estoppel by acquiescence.[24]

[§ 325.] (C) **Effect.**—The courts recognize the application of estoppel by recognition and acquiescence for the purpose of establishing stability.[25] Therefore acquiescence is strengthened by the lapse of time, and while some decisions merely require a long period of time,[26] in general no period short of the statutory period is conclusive,[27] but this requirement is not essential where substantial loss would be caused by a change of the position of the line.[28] Where a line has existed for the statutory period the establishment is fixed[29] irrespective of the correctness of the line.[30]

Lines established by recognition and estoppel prevail over course and distance in case of conflict[31] and bind persons acquiescing thereto and their grantees,[32] but only the actual parties or their privies.[33] The rules which apply to acquiescence between natural persons are applicable where one party is an actual person and the other a corporation,[34]

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[23]Michael v. Megan (Iowa), 115 N. W. 483.

[24]Andrews v. Meredith, 131 Iowa 716, 109 N. W. 287.

[25]McNichol v. Flynn, 167 App. Div. 646, 153 N. Y. S. 308.

[26]Tripp v. Bagley (Utah), 276 Pac. 912; Wood v. Bapp, 41 S. Dak. 195, 169 N. W. 518.

[27]Trustees Leland Stanford University v. Miller, 54 Cal. App. 102, 201 Pac. 952; Carstensen v. Brown, 32 Wyo. 491, 236 Pac. 517; Evert v. Turner, 184 Iowa 1253, 169 N. W. 625; McAleer v. Glover, 146 Ga. 369, 91 S. E. 114; Baker v. Johnson, 79 Ind. App. 413, 138 N. E. 780.

[28]Baker v. Johnson, 79 Ind. App. 413, 138 N. E. 780; Muchenberger v. Santa Monica, (Cal.), 275 Pac. 803.

[29]Watson v. Hogan, 130 Iowa 350, 106 N. W. 759.

[30]Roberts v. Blount (Tex. Civ. App.), 120 S. W. 933; Yarbrough v. Stuckey (Ga. App.), 147 S. E. 160.

[31]Laughlin v. Francis, 129 Iowa 62, 105 N. W. 360.

[32]Trustees Leland Stanford University v. Miller, 54 Cal. App. 102, 201 Pac. 952; Amber v. Cain (Iowa), 110 N. W. 1053.

[33]Ivey v. Cowart, 124 Ga. 159, 52 S. E. 436, 110 Am. St. 160.

[34]Helmick v. Davenport R. I. &c. R. Co., 174 Iowa 558, 156 N. W. 736.

and a municipality can lose no rights by acquiescence,[35] but estoppel may operate because of acts of the municipality.

VII. BY SUBMISSION TO ARBITRATORS.

[§ 326.] Boundaries in dispute may, under the common law, be determined by an arbitration,[36] and the decision of the arbitrators is binding upon the parties concerned, although there be no written agreement,[37] and it is not essential that a conveyance be made or ordered to be made, for the award acts as an estoppel and precludes the losing party and those claiming under him.[38] The award is regarded as an adjudication by a tribunal of the parties own choice,[39] and is not to be set aside for errors in judgment,[40] and if it conforms to the submission it may be impeached only for fraud, partiality, misconduct or gross mistake on the part of the arbitrators to the evident injury of the party claiming it,[41] and can not be impeached for irregularities not objected to at the time.[42] The decision may be impeached upon the grounds that the arbitrators exceeded their authority and that the award was not within the submission,[43] or that they acted under a miscomprehension based on erroneous interpretation of the intention of the parties to the agreement.[44] A written agreement merely providing for a survey at joint expense does not bind the parties thereto to the boundary established,[45] and if one party adopts the line so run and builds in conformity

[35]Quinn v. Baage, 138 Iowa 426, 114 N. W. 205. See § 347, infra.

[36]Turner v. Spicer, 198 Ky. 739, 249 S. W. 1038.

[37]Hill v. Walker (Tex. Civ. App.), 140 S. W. 1159; Thayer v. Bacon, 3 Allen (85 Mass.) 163, 80 Am. Dec. 59.

[38]Turner v. Spicer, 198 Ky. 739, 249 S. W. 1038.

[39]Hopper v. Hickman, 169 Mo. 166, 69 S. W. 297.

[40]Goodridge v. Dustin, 5 Metc. (46 Mass.) 363.

[41]Robbs v. Woolfolk (Tex. Civ. App.), 224 S. W. 232.

[42]Allen v. Hickman, 156 Mo. 49, 56 S. W. 309.

[43]Morton v. Dresser, 108 Mass. 71; Goff v. Goff, 78 W. Va. 423, 89 S. E. 9.

[44]Scrivner v. Johnson, 166 Ark. 140, 265 S. W. 647.

[45]Thayer v. Bacon, 3 Allen (85 Mass.) 163, 80 Am. Dec. 59.

with it, the other party is not thereby estopped from claiming that it is not the true line if it does not appear that he knew the other was incurring expense upon the faith of a supposed agreement to regard the line so run as the true one.[46]

VIII. BY PRIVATE SURVEY.

[§ 327.] Where the owners of adjoining land under parol agreement share the expense of a survey for the purpose of establishing the boundary between them, and after such survey is made the line is marked upon the ground and one party builds a fence thereon, the line so located is binding upon them.[47] It has also been held that an agreement to abide by a survey necessarily carries with it an implied understanding that the boundary line must be the correct one and be established with approximate certainty and should not be construed as an agreement to abide by a line whether right or wrong.[48] In absence of an expressed agreement that the survey is to establish the boundary, the fact that the parties consent to the survey does not of itself establish the line as run by it,[49] but where adjoiners agreeing on a line employ a surveyor to run it, the line so run and established will be conclusive on them.[50] Mere acquiescence in a line erroneously run by private survey will not conclude the parties,[51] but where long continued and beyond the statute of limitations, estoppel does arise,[52] and where a party consents to the building of a fence upon the line of the survey, he is estopped from denying the line.[53]

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[46]Thayer v. Bacon, 3 Allen (85 Mass.) 163, 80 Am. Dec. 59.

[47]Roberts v. Birks, 223 Ill. 291, 79 N. E. 103.

[48]Wilson v. Stork, 171 Wis. 561, 177 N. W. 878.

[49]Stone v. Richardson (Iowa), 218 N. W. 332.

[50]Gullett v. Phillip, 153 Ind. 227, 54 N. E. 804.

[51]Pickett v. Nelson, 79 Wis. 9, 47 N. W. 936.

[52]Boyd v. Graves, 4 Wheat. (17 U. S.) 514, 4 L. ed. 460.

[53]Cheshire v. McCoy, 205 Iowa 474, 218 N. W. 329.

IX. BY STATUTORY PROCEEDINGS.

[§ 328.] The statutes in many jurisdictions provide for the appointment of commissioners or processioners to establish lost boundaries or for the establishment of the same by the county surveyor. The procedure to be followed by these officers in the determination of boundaries and the effect to be given to their findings vary widely in the different states. In a few jurisdictions their determinations are final unless appealed from within a prescribed time; but in general these officers report to the court which takes judicial action and by confirmation establishes the boundaries.

The statutes regarding establishment should provide simple means of operation and should aim to keep the necessary expenses down to a minimum. Furthermore they should encourage community adjustments wherever such are necessary. Poor deed descriptions and alleys established by prescription have resulted in whole city blocks where private boundaries are impossible of location. The establishment of one line in such an area necessitates a situation survey of all the properties, and if the cost of this can be divided by ten or twenty instead of by two, the expense to the individual is appreciably reduced. Furthermore a situation survey made for the purpose of finding the original lines will invariably give better results than a legal contest undertaken for the purpose of holding to a predetermined line.

X. FORMAL AGREEMENT SHCULD BE ENCOURAGED.

[§ 329.] Establishment is essential in the application of controlled surveys to boundaries, and it is for this reason that a generation is necessary for the transition. Legal machinery might be created to hasten the process, but it

would merely precipitate countless boundary disputes, which can be far better settled privately, as it were, by the parties concerned. Better progress can be made by more care in writing deed descriptions when properties are conveyed, and by the grantee's lawyer insisting upon a survey prior to the conveyancing, or better, prior to the writing of the contract. The engineer can tie in those boundaries fixed by clear deed descriptions which are in agreement with the situation, but where there is conflict, or the line "floats" the courts or the interested parties must fix the location before the engineer can coordinate the line. When properties change hands there is always a good opportunity to fix the position of a doubtful or questioned line, for it is greatly to the advantage of the newcomer to have a definite boundary, and it should be relatively easy to obtain his acquiescence to a line which is essentially established. If this is acquired, the deed description can be written in accord with the accepted situation and the line referenced to the city monuments.

Diplomacy, tact and cooperation are essential to induce parties who have established a line by unconscious acquiescence to formally acknowledge the same. Lawyers who, by their united efforts have succeeded in obtaining an agreement which can be placed upon the records, have served the public as well as their clients.

CHAPTER VII.

ADVERSE POSSESSION.

I. GENERAL.

Section.
335. General.

II. NECESSARY ELEMENTS.

336. Actual Possession.
337. Open and Notorious Possession.
338. Exclusive Possession.
339. Hostile Possession.
340. Continuity.

III. INTERRUPTION.

341. Acts of Owner.
342. Acts of Claimant.
343. Acts of Third Party.

IV. COLOR OF TITLE.

344. General.
345. Effect.
346. Good Faith.

V. AGAINST WHOM ADVERSE POSSESSION DOES NOT RUN.

347. Against Whom Adverse Possession Does Not Run.

VI. WHO MAY ACQUIRE PROPERTY BY ADVERSE POSSESSION.

348. Who May Acquire Property by Adverse Possession.

VII. EXTENT OF ADVERSE POSSESSION.

349. Under Claim of Title.
350. Under Color of Title—Construction of Description.
351. Extent of Possession—General Rules.
352. Mixed Possession—General.
353. Constructive Possession of Overlap Always in Senior.
354. Constructive Possession in Junior Falsely Founded.
355. Lappage Must Be Actual.

VIII. RIGHT OR TITLE ACQUIRED.

356. Right or Title Acquired.

I. GENERAL.

[§ 335.] "Adverse possession of another's land is such a possession as, when accompanied by certain acts and circumstances, will vest title in the possessor,"[1] and neces-

[1]Mills, C. J., in Johnson v. Albuquerque, 12 N. Mex. 20, 72 Pac. 9, 11.

sarily involves a disseisin or ouster of the true owner;[2] and in order to acquire title by adverse possession the disseisin must be such as will give a right of action to the owner at any time during the period for which such possession must be held.[3] The purpose of the doctrine is to maintain the status quo, and the statutes protect the adverse occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying the contest beyond the period assigned for it,[4] and therefore all presumptions are to be made in favor of the true owners.[5] In general the doctrine of limitations is one of repose,[6] and the statutes operate to cut off one's right to bring action for the recovery of his rightful property and to vest the disseisor with the title.[7] Adverse possession is distinctly a necessary evil and for this reason, if no other, presents some of the most doubtful and litigated questions known to law.[8] The complexity of its application becomes apparent when it is realized that to acquire title by adverse possession five conditions must be satisfied simultaneously,[9] and whether or not these requirements are met depends upon the determination of matters of fact, and such delicate questions of law as color of title, land included under the same, tacking, intention and good faith. These matters do not permit sharp distinctions, and the drawing of fixed lines to differentiate situations. The wretched control of boundaries and the indifference in writing of deed descriptions adds to the confusion and extends the necessity of adverse possession as a means of maintaining the status quo. The principles of establishment shade into adverse possession so intimately that they are

[2]Johnson v. Ingram, 63 Wash. 554, 115 Pac. 1073.

[3]Wilson v. Braden, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. 927.

[4]Abel v. Love, 81 Ind. App. 328, 143 N. E. 515, 520.

[5]Abel v. Love, 81 Ind. App. 328, 143 N. E. 515, 520.

[6]Young v. Knox, 165 Ark. 129, 263 S. W. 52.

[7]Northern Pac. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. 302.

[8]Moody v. Fleming, 4 Ga. 115, 48 Am. Dec. 210.

[9]Abel v. Love, 81 Ind. App. 328, 143 N. E. 515.

practically one subject. This is particularly true of the problem as it comes to the engineer in connection with matters of boundary. Garages are found with the eaves over the line, and the question arises as to whether such a trespass is evidence of the establishment of a recognized line, or mere trespass which at the most may ripen into an easement, or an exclusive possession which amounts to a disseisin.[10]

For these reasons adverse possession may be cited as a confirmation of the saying "Hard cases make poor law." No one appreciates better than the engineer who comes in contact with adverse possession in the field the difficulties the court must face in rendering a just decision in such a case. The engineer justifies the underlying theory on the principle that every man owes it to his neighbors to maintain his boundaries.

II. NECESSARY ELEMENTS.

[§ 336.] (A) Actual Possession.—In all jurisdictions the possession necessary for adverse possession to operate must be actual,[11] by which is meant a foothold on the land and a possession in fact evidenced by entry and occupation.[12] Precise rules to establish the sufficiency of occupancy to meet this definition are impossible to lay down, and each case must be decided according to the circumstances.[13] In general the rule is more strictly construed in the city and in populous areas.[14] The nature and situation of the lot and the uses to which it is adaptable during the period of its occupancy should be kept in mind,[15] and these

[10]See § 338.

[11]Ward v. Cochran, 150 U. S. 597, 606, 37 L. ed. 1195, 14 Sup. Ct. 230.

[12]Churchill v. Onderdonk, 59 N. Y. 134.

[13]Roberts v. Richards, 84 Maine 1, 24 Atl. 425, citing Webb v. Richardson, 42 Vt. 465, 473.

[14]Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220.

[15]Eyre v. Faribault, 121 Minn. 233, 141 N. W. 170.

are in fact controlling factors in determining what acts suffice to make a possession actual.[16] The fact that the claimant has color of title does not dispense with the necessity of actual possession,[17] but under such conditions less frequency of the acts of ownership may suffice,[18] and actual possession of a part may extend the constructive possession to all the land embraced under the instrument giving color of title.[19]

Possession is always actual when it is an open and visible occupation.[20] In questions of title residence is a most effective mode of establishing actual possession,[21] but in matters of boundary the making of improvements to the line claimed is of greater significance because it informs the owner of occupancy, and that such is a permanent intrusion and not merely a temporary trespass. However, neither of these is essential unless required by statute,[22] and the possession of land may consist in and be shown by a variety of acts.[23] In open country enclosure of land is not necessary unless required by statute,[24] and it is not in itself without other acts such actual possession as may ripen into title.[25] In jurisdictions that require enclosure it is essential that the same be substantial and complete.[26] The enclosure serves to define the extent of the claim and therefore natural boundaries such as a stream,[27] highway[27a] or adjoining

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[16]Baker v. DeArmijo, 17 N. Mex. 383, 128 Pac. 73.

[17]Willamette Real Estate Co. v. Hendrix, 28 Ore. 485, 42 Pac. 514, 521.

[18]Baker v. De Armijo, 17 N. Mex. 383, 128 Pac. 73.

[19]See § 353, infra.

[20]Valcalda v. Silva Peak Mines, 86 Fed. 90, 94.

[21]Bennett v. Kovarick, 23 Misc. 73, 51 N. Y. S. 752.

[22]Costello v. Edson, 44 Minn. 135, 46 N. W. 299.

[23]Costello v. Edson, 44 Minn. 135, 46 N. W. 299.

[24]Fletcher v. Fuller, 120 U. S. 534, 553, 30 L. ed. 759, 7 Sup. Ct. 667; Hughes v. Anderson, 79 Ala. 209.

[25]Appel v. Childress, 53 Tex. Civ. App. 607, 116 S. W. 129.

[26]Hill v. Edie, 49 Hun 605, 1 N. Y. S. 480; Archibald v. New York Cent., &c., R. Co., 157 N. Y. 574, 52 N. E. 567.

[27]Sanders v. Riedinger, 30 App. Div. 277, 51 N. Y. S. 937.

[27a]Hill v. Edie, 49 Hun 605, 1 N. Y. S. 480, 17 N. Y. St. 255.

land of one making no hostile claim[28] may form a portion of the enclosure. In cities where only the boundary is involved there is little or no practical need that the enclosure be complete, but a fence on the line claimed is a most excellent expression of actual possession, declaration of intention, and evidence of exclusion. However, where the use of the land claimed is not susceptible to fencing as in the case of a small plot serving as means of entry to a store, the necessity of enclosure may be overcome by the circumstances.[29]

The payment of taxes can not be regarded as actual possession, though it may define the extent of the claim,[30] but it may have an important bearing in questions of adverse possession.[31] In some jurisdictions it is given no weight as evidence of actual possession,[32] but when man's reluctance to pay the same is regarded, it is at once seen that this viewpoint is untenable and the better, if not the predominant, authority regards payment as evidence[33] not of possession but of claim of right.[34] It does not necessarily follow that nonpayment is an admission of title in another,[35] and as the payment of taxes is not in itself an act constituting adverse possession[36] such action on the part of the title holder although an assertion of ownership is not sufficient to overcome the acquisition of title by the adverse possessor when he has actual possession and has satisfied

[28]Brown v. Doherty, 93 App. Div. 190, 87 N. Y. S. 563.

[29]Bensdorff v. Uihlein, 132 Tenn. (5 Thomp.) 193, 177 S. W. 481, 2 A. L. R. 1364.

[30]Girard v. Philadelphia, 2 Wall. Jr. 301, 10 Fed. Cas. No. 5459.

[31]Fletcher v. Fuller, 120 U. S. 534, 553, 30 L. ed. 759, 7 Sup. Ct. 667.

[32]Brooklyn Q. C., &c., R. Co. v. Bird, 76 Misc. 62, 134 N. Y. S. 1, citing Archibald v. New York Cent. R. Co., 157 N. Y. 574, 52 N. E. 567.

[33]Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442.

[34]Holden v. Page, 118 Maine 242, 107 Atl. 492; Krueger v. Market, 124 Minn. 393, 145 N. W. 30.

[35]Fletcher v. Fuller, 120 U. S. 534, 553, 30 L. ed. 759, 7 Sup. Ct. 667.

[36]Dickinson v. Bales, 59 Kan. 224, 52 Pac. 447.

the other requirements.[37] Assessment lists are so notoriously inaccurate that it is not necessary to cite authority to support their insufficiency as evidence of adverse possession. This may be true of even special assessments such as for pavements, although some of these are extremely accurate. Such might have value as confirmatory of other evidence, but data obtained from assessment lists is a poor foundation upon which to base a contradiction. It is not necessary that taxes be paid to establish possession unless the statutes so require,[38] and where a statute is enacted during the period of occupancy necessary to claim by adverse possession, it has no effect upon payment of the taxes prior to its enactment,[39] but the payment of special assessments is included.[40] It is interesting to note that if the rightful owner or adverse possessor makes a payment subsequent to that made by the other, the last payment is of no avail to the party making it for the assessment against the land has been satisfied and discharged,[41] and the second payment is a gratuity to the taxing power.[42]

Actual possession is not established by entering land, surveying the same,[43] and fixing the boundaries thereof,[44] even when accompanied by the establishment of monuments;[45] but nevertheless where the owner of a city lot facing fifty feet on a city street and adjacent to an abandoned alley had a survey made to include one-half of the alley (seven feet) and set posts at the corners of the lot thus enlarged, cut grass and weeds to the limit indi-

[37]Cook v. Rounds, 60 Mich. 310, 27 N. W. 517; Hargis v. Lawrence, 135 Ark. 321, 204 S. W. 755.

[38]Illinois Cent. R. Co. v. Moore, 160 Ill. 9, 43 N. E. 364.

[39]Allen v. McKay, 120 Cal. 332, 52 Pac. 828.

[40]Chicago v. Middlebrooke, 143 Ill. 265, 32 N. E. 457.

[41]Clayton v. Feig, 188 Ill. 603, 59 N. E. 245, 246.

[42]Morrison v. Kelly, 22 Ill. 609, 74 Am. Dec. 169.

[43]Wilson v. Braden, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. 927; Archibald v. New York Cent. &c. R. Co., 157 N. Y. 574, 52 N. E. 567.

[44]Smith v. Berry, 202 Ky. 502, 260 S. W. 348.

[45]Mission of Immaculate Virgin v. Cronon, 143 N. Y. 524, 38 N. E. 964.

cated, and pointed it out as his property, such acts were together sufficient to constitute adverse possession even though the lot was not built upon.[46]

The statement as made above is sound law, but the last case cited well illustrates the possible effect of a survey. While it is not actual possession, it may be evidence of a hostile claim, and raise questions of acquiescence and if not renounced at once may complicate the settlement of the inevitable dispute which is merely postponed. A survey may serve to define the bounds of a claim of title and with other acts may make the possession actual to the marked bounds.[47]

The acts of a tenant who goes into possession under the terms of a lease will if they are sufficient in themselves to constitute adverse possession suffice for the lessor or principal in setting up a claim[48] within the limits set up in the lease,[49] but the tenant must take actual possession.[50]

[§ 337.] (B) Open and Notorious Possession.—The possession of the disseisor must be open and notorious or it is not adverse.[51] It is not necessary that the occupation be such as to inform a passing stranger that some one is adversely asserting title. If it be such as to notify and warn the owner should he visit the premises that a person is in possession under a hostile claim, it is sufficient,[52] for the purpose of notoriety is to bring home to the rightful owner by presumption the actual and hostile possession of the disseisor,[53] and where the former has actual knowledge

[46]Whalen v. Smith, 183 Iowa 949, 167 N. W. 646.

[47]Girard v. Philadelphia, 2 Wall Jr. 301, 10 Fed. Cas. No. 5459.

[48]Abel v. Love, 81 Ind. App. 328, 143 N. E. 515.

[49]Camden v. West Branch L. Co., 59 W. Va. 148, 53 S. E. 409, 415.

[50]Beasley v. Clarke, 102 Ala. 254, 14 So. 744.

[51]Endicott v. Haviland, 220 Mass. 48, 107 N. E. 394.

[52]Merritt v. Westerman, 180 Mich. 449, 147 N. W. 483, citing Whitaker v. Erie Shooting Club, 102 Mich. 454, 60 N. W. 983.

[53]Thompson v. Logan, 166 Ala. 45, 51 So. 985.

of the same, the necessity for the rule no longer exists.[54] The necessity for notoriety can well be comprehended from the reason for the rule which is based on the doctrine that until the owner has or ought to have knowledge that his land is held adversely he is not called upon to act, for he is not aware of the need of action, and the law does not require absurd things of anyone.[55] In the absence of statutes to the contrary open and notorious possession, or possession with actual knowledge of the owner is in itself sufficient, and constructive notice is unnecessary,[56] and to take title by adverse possession it is sufficient to prove acts of possession so open and notorious that the owner upon viewing the land may be presumed to know of their character and their extent.[57] The importance of notoriety has induced the courts to make very extravagant statements, and it has been said that by notoriety is meant that the possession must from its nature appraise the world that the land is occupied and reveal the party claiming the ownership,[58] and that it must be so conspicuous and talked about by the public that it is generally known.[59] This definition is obviously more stringent than the purpose of notoriety requires, and is to be more properly regarded as an emphasis of the necessity.

[§ 338.] (C) **Exclusive Possession.**—Exclusive possession is essential.[60] The necessity of this is apparent when one of the parties in possession is the rightful owner, for seisin follows the title, and there can be no disseisin unless the rightful owner is altogether deprived of posses-

[54]Lasley v. Kniskern, 152 Mich. 244, 115 N. W. 971.

[55]Delaware & H. Canal Co. v. Hughes, 183 Pa. 66, 38 Atl. 568, 569.

[56]Illinois Cent. R. Co. v. Noyes, 252 Ill. 178, 96 N. E. 830.

[57]Holden v. Page, 118 Maine 242, 107 Atl. 492.

[58]Towle v. Quante, 246 Ill. 568, 92 N. E. 967.

[59]Philbin v. Carr, 75 Ind. App. 560, 129 N. E. 19.

[60]Philbin v. Carr, 75 Ind. App. 560, 129 N. E. 19; Smith v. Hosmer, 7 N. H. 436, 28 Am. Dec. 354.

sion.[61] It has been held that the use of an eighteen-inch strip subject to drippings from the eaves of a barn was a continued claim of title and possession thereto and prevented the exclusiveness of the one actually using the ground,[62] but there are also decisions to the contrary.[63] If it is admitted that the actual use of ground subject to the drippings of the eaves and beneath the same is exclusive and sufficient to establish title by adverse possession, then the owner of the building is placed at a disadvantage. He has kept back from his line so as to keep his improvements entirely upon his own land, and the law instead of protecting him places upon him the burden of constantly defending a narrow strip of no practical use beyond that to which it is obviously put. Nor should the use of another's land for drippings from the eaves of a building built on or near the line be deemed exclusive, for this would easily enable a man without good faith to utilize the law to defend petty larceny. Land subject to drippings from eaves is not exclusively held, and this is an evident undeniable fact.

Obviously the use of land in common with others is not exclusive, but where the use by others is permitted,[64] as where a store owner allows customers entry to his store over land he adversely claims, exclusion still operates.[65] The question of exclusion may technically support the theory that land in a street can not be acquired by adverse possession, but other and more substantial reasons exist.[66] When the public has an easement in the land in question adverse possession can not ripen into title.[67]

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[61]Towle v. Quante, 246 Ill. 568, 92 N. E. 967.

[62]Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917; Belding v. Huttenlocher, 177 Iowa 440, 159 N. W. 191.

[63]Randall v. Sanderson, 111 Mass. 114. See § 399.

[64]Woodruff v. Langford (Iowa), 115 N. W. 1020.

[65]Bensdorff v. Uihlein, 132 Tenn. (5 Thomp.) 193, 177 S. W. 481.

[66]See § 347, infra.

[67]New York v. De Peyster, 120 App. Div. 762, 105 N. Y. S. 612.

[§ 339.] (D) Hostile Possession.—Possession to be adverse must be hostile,[68] by which is meant against the interest of the right owner and in opposition to the title to which the possession is alleged to be adverse,[69] but there need not be any ill will, malevolence, or desire to injure anyone, nor is it necessary that there be a dispute.[70] The reason for the necessity of hostility is almost identical with that requiring notoriety. Chief Justice Marshall has said, "It would shock the sense of right which must be felt by legislators and by judges, if a possession, which was permissive and entirely consistent with the title of another, should silently bar that title."[71] Hostility is not assumed from the exclusiveness of a possession,[72] for possession alone may evidence only the mere act of rightful occupation consistent with a present interest under a lease,[73] and it is not the possession alone, but possession accompanied by hostility as evidenced by claim of fee that gives character to adverse possession.[74] The hostility must exist throughout the entire period required by the statutes.[75] In Illinois it has been held that to effect a bar to the legal title the possession must be hostile in its inception,[76] but there is no strong ground to substantiate this requirement, for if it is apparent that where a possession begun subservient to the title has distinctly been changed in character and is beyond a shadow of doubt hostile, the requirement is satisfied with the beginning of the hostility.[77] Under these circumstances the acts relied upon to start the period running should be

[68]United States Gypsum Co. v. Christenson, 226 Mich. 347, 197 N. W. 497.

[69]Mills v. Laing, 38 Cal. App. 776, 177 Pac. 493.

[70]Ballard v. Hansen, 33 Nebr. 861, 51 N. W. 295.

[71]Kirk v. Smith, 9 Wheat. (22 U. S.) 241, 288, 6 L. ed. 81.

[72]Dobbins v. Economic Gas Co., 182 Cal. 616, 189 Pac. 1073.

[73]Coquille Mill &c. Co. v. Johnson, 52 Ore. 547, 98 Pac. 132, 132 Am. St. 716.

[74]Pierro v. Minneapolis, 139 Minn. 394, 166 N. W. 766.

[75]Collins v. Bluff City Lbr. Co., 86 Ark. 202, 110 S. W. 806. See § 340, infra.

[76]Maring v. Meeker, 263 Ill. 136, 105 N. E. 31.

[77]Omodt v. Chicago, M. &c. R. Co., 106 Minn. 205, 118 N. W. 798; see also Skala v. Lindbeck, 171

exceptionally notorious and hostile, and there must be an adequate cause for the change or for imputing it, and strictest proof of hostility is required.[78] It is important to note that hostility need not rest upon a legal right, and exists where one enters on and occupies a property with the intention to hold as his own irrespective of any semblance or shadow of right or title.[79] As color of title is merely "that which in appearance is title, but in reality is not,"[80] it acts simply to justify the hostility and can not give it a legal foundation.

As was noted in connection with notoriety some decisions state that claim of title must be "against the whole world"[81] and "against all parties,"[82] and against "the true owner and all parties."[83] If these phrases were in each instance strictly adhered to, the mathematical probability of establishing title by adverse possession would be so slight that the attempt would not warrant the expense. In ejectment the owner must recover on the strength of his own title,[84] and therefore the important fact is that it is made against him in particular. When it is made against the whole world it is presumed that it is made with such notoriety that he must know,[85] and these expressions are merely another way of saying that the claimant claims as owner, which is the essential fact.[86]

Certain possessions are regarded as lacking in hostility,

Minn. 410, 214 N. W. 271, and § 346, infra.

[78]Omodt v. Chicago, M. &c. R. Co., 106 Minn. 205, 118 N. W. 798.

[79]Cain v. Higland Co., 134 Minn. 430, 159 N. W. 830, 872. See § 346, infra.

[80]Power v. Kitching, 10 N. Dak. 254, 86 N. W. 737, 740, 88 Am. St. 691.

[81]Florella v. Jones (Mo.), 259 S. W. 782.

[82]Ashford v. Ashford, 136 Ala. 631, 34 So. 10, 96 Am. St. 82.

[83]Ward v. Cockran, 150 U. S. 597, 608, 37 L. ed. 1195, 14 Sup. Ct. 230.

[84]Mather v. Walsh, 107 Mo. 121, 17 S. W. 755; Steinhauser v. Spraul, 114 Mo. 551, 21 S. W. 515, 859.

[85]Boe v. Arnold, 54 Ore. 52, 102 Pac. 290.

[86]Northern Pac. R. Co. v. Kranich, 52 Fed. 911.

and many relationships arising from family[87] and business connections[88] or legal situations[89] raise the presumption that the possession is not adverse, and to overcome this presumption there must be an open assertion of possession against the holder of title.[90] These do not usually affect boundaries, but may in certain instances as where a party who holds a strip of his neighbor's property adversely, leases the neighbor's land, and the description of the lease includes the strip held adversely, the continuity is broken, as the hostility ends with the recognition of the neighbor as a landlord,[91] for the possession of a tenant is not hostile to the landlord.[92]

[§ 340.] **(E) Continuity.**—Continuity is one of the five essential elements of adverse possession,[93] and a single interruption of ever so short a duration necessitates a new beginning, for the moment the land becomes vacant, the law restores possession to the title owner.[94] Where the statutory provisions require possession under a duly recorded deed, a delay of five months in registering a deed in the chain of title is a break in the continuity.[95] Continuity is just as necessary when the adverse possession is under color of title.[96] Some statutes provide for a peaceful pos-

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[87]Whitten v. Peace, 188 N. Car. 298, 124 S. E. 571; Chase v. Lavelle, 105 Nebr. 796, 181 N. W. 936.

[88]Hoskins v. Byler, 53 Ark. 532, 14 S. W. 864; Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384; Immell v. Seaverns, 117 Kan. 12, 230 Pac. 69.

[89]Blair v. Hazzard, 158 Cal. 721, 112 Pac. 298; Harris v. McDonald, 152 Ga. 18, 108 S. E. 448.

[90]Woolworth v. Root, 40 Fed. 723 affd. 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. 136; Coombs v. Haley Coal Co., 276 Fed. 342; Chandler v. Pope, 205 Ala. 49, 87 So. 539; Creech v. Creech, 186 Ky. 149, 216 S. W. 127; Collins v. Colleran, 86 Minn. 199, 90 N. W. 364; Beitz v. Buendiger, 144 Minn. 52, 175 N. W. 440.

[91]Hermann v. McIver, 51 Tex. Civ. App. 270, 111 S. W. 766.

[92]Washington v. Moore, 84 Ark. 220, 105 S. W. 253, 120 Am. St. 29.

[93]Abel v. Love, 81 Ind. App. 328, 143 N. E. 515, 518.

[94]Suffleton v. Nelson, 2 Saw. 540, 22 Fed. Cas. No. 12822; Philbin v. Carr, 75 Ind. App. 560, 129 N. E. 19.

[95]Daugherty v. Manning (Tex. Civ. App.), 221 S. W. 983.

[96]Brown v. Hartford, 173 Mo. 183, 73 S. W. 140.

session which by definition is closely related to continuity. It has been said that a possession to be peaceful must only be continuous and undisturbed.[97] In Texas it is defined by statute as "continuous and not interrupted by adverse suit to recover the property,"[98] and elsewhere the courts have interpreted it as a possession which the rightful owner, or a third party, has not interrupted by an act which is suable at law by a suit which may or will involve title.[99]

It is not essential that the adverse possession be held against the same party throughout the required period,[1] and practically all statutes provide for "tacking" or uniting of holdings of successive adverse occupants to make up the statutory period.[2] To tack it is essential that there be privity, which may be defined as a succession of relationships to the same rights of property created by deed or other act, or by operation of law,[3] for different entries unconnected are a succession of trespasses even though there may be no appreciable interval between the same.[4] It is generally held that "there must be privity of grant or descent, or some judicial or other proceedings which shall connect the possession so that the latter shall apparently hold by right of the former"[5] and that "the privity may be created in any way that will prevent a break in the adverse possession and refer the several possessions to the original entry, and it may be created by parol or otherwise from vendor to vendee."[6]

In questions of boundary the manner in which the priv-

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[97]McAvoy v. Cassidy, 8 Misc. 595, 29 N. Y. S. 321.

[98]North Fort Worth Townsite v. Taylor (Tex. Civ. App.), 262 S. W. 505.

[99]De Hanne v. Bryant, 61 N. J. Eq. 141, 48 Atl. 220.

[1]Jones v. Devereux, 90 S. Car. 513, 73 S. E. 1027.

[2]J. B. Streeter Jr. Co. v. Fredrickson, 11 N. Dak. 300, 91 N. W. 692.

[3]3 Words and Phrases (2d), 1218; Atwell v. Shook, 133 N. Car. 387, 45 S. E. 777, 779.

[4]Davock v. Nealon, 58 N. J. L. 21, 32 Atl. 675.

[5]Moore v. Helvy, 235 Mo. 443, 138 S. W. 481, 482, citing Crispen v. Hannavan, 50 Mo. 536.

[6]Waller v. Dansby, 145 Ark. 306, 224 S. W. 615, 616.

ity is maintained is important, for the conveyance to an adverse claimant relied upon for tacking may not include within its bounds the land adversely held if the deed description is strictly construed, and the tacking may therefore depend entirely upon an understanding. If it was generally held as it is in Massachusetts that when "several persons successively enter on land as disseisors, without any conveyance from one to another, or privity of estate between them, other than that derived from possession of the estate, their several possessions can not be tacked,"[7] this situation might frequently prevent the establishment of a boundary by adverse possession. The awkwardness of the Massachusetts rule is illustrated in Wishart v. McKnight,[8] where the strip claimed adversely was fenced off from other lands as if it belonged to the house conveyed by deed, was in part covered by a barn, and was necessary for access to the house and premises, but admittedly without description of the deed. Tacking was necessary to make up the required period for acquiring the strip adversely, but because of the exclusion of the strip from the deed description was unavailable under the rule as laid down in Sawyer v. Kendall.[9] The court held that as the maintenance of possession of the house and strip by all successive owners, as if they belonged together furnished a presumptive fact that the seisin and possession of one part were transferred at the same time as the seisin and possession of the other, or in other words, the privity recognized by law accompanying the transfer of the land within the deed description, was a sufficient foundation to support an irregular privity without the law, because the common understanding confirmed by the actual situation, made the two portions one.

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[7]Sawyer v. Kendall, 10 Cush. (64 Mass.) 241, 244.

[8]178 Mass. 356, 59 N. E. 1028, 86 Am. St. 486; 184 Mass. 283, 68 N. E. 237. See also Harrison v. Dolan, 172 Mass. 395, 52 N. E. 513.

[9]10 Cush. (64 Mass.) 241, 244.

A more direct and less complicated method of arriving at the same result is found in Lougee v. Shuhart,[10] where tacking was necessary to establish by adverse possession a strip without the bounds of the deed description, but within the limits of a house upon the premises conveyed. Both the parcel conveyed and the land adjoining were previously held by a common grantor and therefore his possession lacking hostility was of no use for tacking. The court held that the obvious and evident intent was to convey the disputed strip along with the other land covered by the house and acknowledgedly within the deed description, and there was no need of considering the problem as involving adverse possession, which is obvious, for this construction of the deed gave the adverse claimant in actual possession of a part not merely color of title but title. However this simple solution is not universally applied,[11] and it is merely offered as a means of overcoming the disadvantage of the Massachusetts rule without making an exception. The law upon which it is based is unsound, for it gives a logical assumption control over an expressed intention.[12] The indirectness of the reasoning in Wishart v. McKnight[13] is better.

The same situation arises where the privity of a constructive possession is maintained by parol, for it is the extent of the color of title that defines the boundaries, and how this is passed from one to the other is of consequence. It is for this reason that it is usually required that color of title be in writing.[14] The theory that privity may be passed by parol merely enables the courts to overcome at least to some extent the rigidity of the rule limiting the bounds of the adverse possession to those of the instrument giving color of title without making an exception to the principles

[10]127 Iowa 173, 102 N. W. 1125.

[11]Sluyter v. Schwab, 73 Nebr. 370, 102 N. W. 757.

[12]See sections 17, 68.

[13]178 Mass. 356, 59 N. E. 1028, 86 Am. St. 486; 184 Mass. 283, 68 N. E. 237.

[14]See §§ 344, 345, infra.

regarding privity. At the best the law in this regard is confusing and unsatisfactory, and where privity is relied upon to complete the required period, evidence that the several possessions are unbroken continuations of the original entry should be strong.

While the purpose of tacking is solely to maintain the continuity, privity is not the only test, and the prior possession relied upon must satisfy the remaining four conditions as well or it is not available.[15] Privity operates not only to identify successive entries by successive adverse claimants as being in fact the same, but to enable a claimant to maintain the continuity of his possession by tacking those of his several tenants[16] or of the same tenant under different leases[17] providing they acknowledge his title,[18] and the occupancy of a vendee holding under an executory contract of purchase is that of his vendor,[19] and if the sale is not consummated his possession as such inures to the benefit of the vendor and may be retacked.[20] The possession of a corporation may be tacked to that of its promoters[21] and the possession of a trustee may be tacked to that of a bankrupt,[22] but as a receiver is an indifferent person whose appointment does not determine any right or title of either party in any manner whatever, persons acquiring land from a receiver in proceedings to foreclose a mortgage are not entitled to tack the time of the receiver's posses-

[15]Davels v. Collins, 43 Fed. 31; Sluyter v. Schwab, 73 Nebr. 370, 102 N. W. 757; Kirby v. Boaz, 103 Tex. 525, 131 S. W. 533; Clark v. Jackson, 222 Ill. 13, 78 N. E. 6; Kohlman v. Glaudi, 52 La. Ann. 700, 27 So. 116.

[16]Belotti v. Bickhardt, 228 N. Y. 296, 127 N. E. 239; also Abel v. Love, 81 Ind. App. 328, 143 N. E. 515.

[17]Hanks v. Houston Oil Co. (Tex. Civ. App.), 173 S. W. 635.

[18]Houston Oil Co. v. Kimball, 103 Tex. 94, 122 S. W. 533, 124 S. W. 85.

[19]Oldig v. Fisk, 1 Nebr. (unoff.) 124, 95 N. W. 492, 93 Am. Dec. 333.

[20]McAuliff v. Parker, 10 Wash. 141, 38 Pac. 744.

[21]Bakersfield Town Hall Assn. v. Chester, 55 Cal. 98.

[22]Cannon v. Prude, 181 Ala. 629, 62 So. 24.

sion of such land to the duration of their subsequent holding in order to establish title by adverse possession.[23]

III. INTERRUPTION.

[§ 341.] **(A) Acts of Owner.**—A break in the continuity may be caused by some act of the real owner, of the adverse claimant, or of a stranger.[24] An entry by the original owner arrests the running of the statute,[25] and gives him constructive possession of all not actually held by adverse claimant,[26] for seisin follows the title,[27] and when the possession of the party who seeks title by limitation ceases or is interrupted, and the land is vacant, the possession of the owner in contemplation of law is at once resumed.[28] In some jurisdictions this is qualified by statutes.[29] It is not every entry by the rightful owner upon the premises that will disturb the adverse possession,[30] and it is essential that the entry be upon some part of the land claimed with the evident intention of taking possession.[31] Although permissive entries are ineffective[32] and temporary intrusions are insufficient,[33] an interruption to be effective need not be for an extended period, but in other regards must satisfy remaining conditions necessary for acquiring title by adverse possession. It must be notorious, for mere denials of the owner or loose verbal claims of title in himself, or any ineffectual protest short of a disturbance of the

[23]Wilkinson v. Lehman-Durr, 136 Ala. 433, 34 So. 216.

[24]Normant v. Eureka Co., 98 Ala. 181, 12 So. 454, 39 Am. St. 45, citing Hughes v. Anderson, 79 Ala. 209, 215.

[25]Henderson v. Griffin, 5 Pet. (30 U. S.) 151, 8 L. ed. 79.

[26]Evans v. Houston Oil Co. (Tex. Com. App.), 231 S. W. 731.

[27]Schlossnagle v. Kolb, 97 Md. 285, 54 Atl. 1006.

[28]Glover v. Pfeuffer (Tex. Civ. App.), 163 S. W. 984. See §§ 349, 351, infra.

[29]Glover v. Pfeuffer (Tex. Civ. App.), 163 S. W. 984; Hasson v. Klee, 181 Pa. 117, 37 Atl. 184.

[30]Thomas v. Spencer, 69 Wash. 433, 125 Pac. 361.

[31]Nelson v. Johnson, 189 Ky. 815, 226 S. W. 94.

[32]Jacob Tome Inst. v. Crothers, 87 Md. 569, 40 Atl. 261.

[33]Bingham Livery &c. Co. v. McDonald, 37 Utah 457, 110 Pac. 56.

rights of the adverse claimant in a legal sense and short of an actual assertion of a right in himself will not interrupt.[34] Although it has been held that the entry must not be casual or secret in character but must be known to the occupant, this assertion is unquestionably too strong, for it would place upon the rightful owner the necessity of making a more positive claim than is required of the adverse holder to acquire title. It is sufficient if made under such circumstances as to enable the party in possession by the use of reasonable diligence to ascertain the right and claim of the party making the entry and to afford the former resort to legal remedies, and if the entry gives reasonable notice of the rightful owner's claim, it is not essential that the adverse holder should have actual notice thereof.[35]

A situation survey is not an entry sufficient to break the continuity.[36] If this fact were more fully appreciated the engineer's work would be more peaceful. A true situation survey is one undertaken by both parties or one of the parties for the purpose of ascertaining the truth regardless of its effect. It is based upon all the available data, and may reveal that the party who believed the title to the ground in dispute to be in him was honestly and with good faith holding adversely, and may quiet the situation. However where a situation survey is made at the expense of one party to a dispute it may only be such in that it lays the situation as he understands it from the data favorable to his claim upon the ground, and if it supports his claim may be the act of raising his flag of possession. A survey with the intent to take possession or when followed by action of ejectment within one year[37] is sufficient to interrupt the continuity. Surveying in itself is devoid of hostility, but

[34]Chavez v. Torlina, 15 N. Mex. 53, 99 Pac. 690.

[35]Batchelder v. Robbins, 93 Maine 579, 45 Atl. 837.

[36]Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 N. W. 550.

[37]Douglas v. Irvine, 126 Pa. 643, 17 Atl. 802.

it may lay the foundation for a claim of title, and is positive evidence that the party making it is questioning the situation. It is a warning to the other party to watch for further developments, and is not to be disregarded, or estoppel and acquiescence may become involved in a situation already complicated by many factors. When one adverse claimant has a survey made, the other should invariably engage a lawyer to guard his interests against the subsequent acts of the former.

The institution of an action against the party in possession arrests the running of the statute during the pendency of the suit, and possession during this period is of no avail,[38] but if the suit is not successful there is no interruption.[39] For a successful interruption arising from a suit there must be an actual change in possession.[40] No interruption is caused by the death of the former owner for the heirs stand in his shoes,[41] and this is true even though infants are entitled to a remainder.[42] Likewise the appointment of a receiver for a corporation having the legal title does not interrupt the running of the statute in favor of the adverse claimant.[43]

[§ 342.] (B) Acts of Claimant.—When an occupant by abandonment fails to keep his flag flying and to present a hostile front, there is an interruption,[44] for a break, no matter how short the period, is fatal,[45] and it is immaterial that it is the intention to return.[46] However it is also held that there is no abandonment when a person leaves the

[38]Breon v. Robrecht, 118 Cal. 469, 50 Pac. 689, 51 Pac. 33, 62 Am. St. 247.

[39]Martin v. Hall, 152 Ky. 677, 153 S. W. 997.

[40]Smith v. Trabue, 1 McLean 87, 22 Fed. Cas. No. 13116.

[41]Mounts v. Mounts, 155 Ky. 363, 159 S. W. 818.

[42]Delano v. Air, 157 Ky. 369, 163 S. W. 216.

[43]Houston Oil Co. v. Dowden, 202 Fed. 714.

[44]Willamette Real Estate Co. v. Hendrix, 28 Ore. 485, 42 Pac. 514, 52 Am. St. 800.

[45]Meek v. Davis, 189 Ky. 64, 224 S. W. 659.

[46]Louisville &c. R. Co. v. Philyaw, 88 Ala. 264, 6 So. 837.

land adversely occupied with the intention of returning.[47] Although continuity is important, and a short break is sufficient to constitute an interruption, the law is not unreasonable. When the occupancy is temporarily broken by a flood or fire, the possessor has a reasonable time to resume possession after such event without there being a discontinuance.[48] Likewise it is recognized that parties can not invariably place a tenant upon a vacated premises, and it is generally held that a temporary vacancy does not break the continuity.[49] Naturally the recognition of title in the disseisee interrupts an adverse possession.[50]

It is rightly held that an offer to purchase an outstanding title negatives the idea of adverse possession and when made after the completion of the prescriptive period tends to show that the enjoyment was not adverse,[51] but this does not justify the conclusion arrived at in a few old decisions that an attempt to purchase an outstanding title causes an interruption.[52] The better view is that this circumstance merely necessitates a careful consideration of the motive.[53] The law does not contemplate the discouragement of peaceful adjustments, and if the attempted purchase of an outstanding claim is merely to quiet title and avoid expensive litigation[54] and made while insisting on ownership but negotiating for peace, it is not an interruption.[55] However if made in acknowledgment to a superior claim it is without further proof a break.[56] The purchase of an out-

[47]Goodrich v. Mortimer, 44 Cal. App. 576, 186 Pac. 844.

[48]Thomas v. Spencer, 66 Ore. 359, 133 Pac. 822.

[49]Bayle v. Norris (Tex. Civ. App.), 134 S. W. 767; Doe v. Finnegan, 210 Ala. 314, 97 So. 822.

[50]Davels v. Collins, 43 Fed. 31; Collins v. Megason (Tex. Civ. App.), 228 S. W. 583.

[51]Minto v. Salem Water L. &c. Co., 120 Ore. 202, 250 Pac. 722.

[52]Moore v. Moore, 21 Maine 350; Jackson ex dem. Ellice v. Britlon, 4 Wend. (N. Y.) 507; Central Pac. R. Co. v. Mead, 63 Cal. 112.

[53]Oldig v. Fisk, 53 Nebr. 156, 73 N. W. 661.

[54]Tobey v. Secor, 60 Wis. 310, 19 N. W. 99.

[55]Clithero v. Fenner, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. 978.

[56]Litchfield v. Sewell, 97 Iowa 247, 66 N. W. 104.

standing title does not break the continuity for the party has the right to protect possession by the purchase of any outstanding claim or lien against the property.[57] Furthermore, where a party in adverse possession brings suit to remove a cloud from the title and is unsuccessful, his rights against strangers to the suit are not affected.[58] Possession of the land ceases to be adverse where the owner of the land for valuable consideration agrees with the holder that suit for possession shall not be brought during the life time of either,[59] and an agreement to arbitrate a boundary dispute providing that the party in occupation shall continue in possession checks the running of the statute.[60]

[§ 343.] (C) **Acts of Third Party.**—Occasional trespasses by parties asserting no claim of title do not constitute interruptions,[61] and are to be judged in the same manner as if the party in possession were the title owner.[62] If the intrusions are continued sufficiently to raise the presumption that the claimant is aware of the same and that they are assertions of an adverse claim, they are effective interruptions unless the claimant resists them successfully by legal remedies.[63] The permissive use of land by a third person causes no interruption,[64] but where a claimant acquiesces in a hostile entry by a third person, the subsequent surrender of the latter's claim to the former does not overcome the break.[65]

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[57]Alsworth v. Richmond Cedar Works, 172 N. Car. 17, 89 S. E. 1008; Oldig v. Fisk, 53 Nebr. 156, 73 N. W. 661; State v. Scott, 91 W. Va. 513, 113 S. E. 907.

[58]Nuller v. Gist, 91 Tex. 335, 43 S. W. 263.

[59]Dietrick v. Noel, 42 Ohio St. 18, 51 Am. Rep. 788.

[60]Perkins v. Blood, 36 Vt. 273; Hunt v. Guilford, 4 Ohio (4 Ham.) 317.

[61]Lucas v. Crofoot, 95 Conn. 619, 112 Atl. 165; Hayes v. Williamson-Brown Lbr. Co., 180 N. Car. 252, 104 S. E. 527.

[62]Cohasset v. Moors, 204 Mass. 173, 90 N. E. 978.

[63]Love v. Turner, 78 S. Car. 513, 59 S. E. 529.

[64]Jacob Tome Inst. v. Crothers, 87 Md. 569, 40 Atl. 261.

[65]Austin v. Bailey, 37 Vt. 219, 86 Am. Dec. 703.

IV. COLOR OF TITLE.

[§ 344.] **(A) General.**—Color of title is merely that which in appearance is title but in reality is no title.[66] It exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title,[67] and when traced to its source need not disclose a good title in the grantor.[68] Any deed or instrument in writing, no matter on what founded, if regular on its face, and purporting to convey the title to land of which a description is given, is sufficient to establish color of title, although it might be ineffectual to establish paramount title apart from possession and satisfaction of such statutory requirements as are necessary.[69] There need be only a sign or semblance of title.[70]

[§ 345.] **(B) Effect.**—Color of title does not eliminate the necessity of actual possession for this is absolute,[71] and to render an instrument operative as color of title possession must be taken of the land or a part of it and claim made to the title of the whole,[72] and while color of title may pass from one to another each must take possession, and where the grantor has never taken possession, the grantee acquires no color of title beyond that arising from his own possession.[73] Color of title is not necessary in

[66]Philbin v. Carr, 75 Ind. App. 560, 129 N. E. 19, citing Wright v. Mattisen, 18 How. (59 U. S.) 50, 15 L. ed. 280.

[67]Cameron v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. 595.

[68]Waterman Hall v. Waterman, 220 Ill. 569, 77 N. E. 142, 4 L. R. A. (N. S.) 776.

[69]Lewis v. Barnhart, 145 U. S. 56, 72, 36 L. ed. 621, 12 Sup. Ct. 772.

[70]Philbin v. Carr, 75 Ind. App. 560, 129 N. E. 19.

[71]Willamette Real Estate Co. v. Hendrix, 28 Ore. 485, 42 Pac. 514, 52 Am. St. 800.

[72]Henry v. Frohlichstein, 149 Ala. 330, 43 So. 126.

[73]Turner v. Neisler, 141 Ga. 27, 80 S. E. 461.

absence of statutory requirements,[74] and statutes which prescribe what is essential to acquire possession under color of title do not prevent the acquisition of land under claim of title.[75] In general, color of title shortens the required statutory period.[76] The acquisition of color of title subsequent to the entry does not relate back to the time of entry under claim of right so that the entire period of actual possession is effective under the statutory provisions,[77] and a claimant by act of his own or by law, may lose his color of title.[78] Color of title is material only in so far as the possession claimed is derived from an instrument constituting color or title.[79] To the engineer its primary effect is to define the limits of the adverse claim.[80] A claim under color of title enlarges the constructive possession and by a legal fiction extends the same beyond the parts actually occupied to the entire tract described in the instrument giving color of title,[81] and for this reason the prevailing authority that some writing is necessary to give color of title is justified.[82]

[§ 346.] (C) **Good Faith.**—Good faith merely means that a person honestly believes that he has acquired a good title regardless of his knowledge and mental capacity[83] and exists wherever the possession is in belief that such taking is rightful.[84] Knowledge on the part of the claimant that

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[74]Holden v. Page, 118 Maine 242, 107 Atl. 492.

[75]Zellmer v. Martin, 157 Wis. 341, 147 N. W. 371.

[76]Lewis v. Barnhart, 145 U. S. 56, 36 L. ed. 621, 12 Sup. Ct. 772.

[77]Robbins v. Moore, 129 Ill. 30, 21 N. E. 934.

[78]Hawley v. Hawley, 187 Ill. 351, 58 N. E. 332; Stewart v. Stewart, 83 Wis. 364, 53 N. W. 686, 35 Am. St. 67; Call v. Dancy, 144 N. Car. 494, 57 S. E. 220.

[79]Carpenter v. Coles, 75 Minn. 9, 77 N. W. 424.

[80]Fleming v. Moore, 122 Ala. 399, 26 So. 174. See § 351, infra.

[81]Crowder v. Doe, 162 Ala. 151, 50 So. 230, 136 Am. St. 17; Hayes v. Williamson Brown Lbr. Co., 180 N. Car. 252, 104 S. E. 527.

[82]United States v. Casterlin, 164 Fed. 437. See § 340.

[83]Lee v. O'Quin, 103 Ga. 355, 30 S. E. 356.

[84]Seigneuret v. Fahey, 27 Minn. 60, 6 N. W. 403.

the title was defective will not impeach good faith[85] for a man will speculate in the purchase of land where he knows there are imperfections and irregularities in the chain of title,[86] or even when he has knowledge of another claim under a different title.[87] But where a claimant knows the title is worthless, all trace of good faith is lacking, and there is no color of title.[88] Although the possession of a predecessor held in bad faith can not be tacked to his own to make the required statutory period,[89] it does not otherwise affect the claimant where he has no knowledge or notice of the facts.[90]

There is conflict as to whether good faith is essential, and it has been held that the possession may originate in a trespass and that the purpose may be to usurp.[91] The necessity of good faith has also been made contingent upon the kind of possession, and it has been held that where there is actual as distinguished from constructive possession, a claim of title need not be made in good faith and may even be fraudulently made to effect a divestiture of title.[92] But there is authority to the contrary[93] and Judge Gilbert's opinion that "this idea of acquiring property by larceny does not go in this country. A man must have a bona fide claim, or believe in his own mind that he has got a right as owner, when he goes upon land that does not belong to him, in order to acquire title by occupation and possession,"[94] represents the better law.

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[85]Montgomery & Mullen Lbr. Co. v. Quimby, 164 Cal. 250, 128 Pac. 402.

[86]Reedy v. Camfield, 159 Ill. 254, 42 N. E. 833; McBride v. Caldwell, 142 Iowa 228, 119 N. W. 741.

[87]Kirby v. Kirby, 236 Ill. 255, 86 N. E. 259.

[88]Litchfield v. Sewell, 97 Iowa 247, 66 N. W. 104; Philbin v. Carr, 75 Ind. App. 560, 129 N. E. 19, 706.

[89]Munson v. Hallowell, 26 Tex. 475, 84 Am. Dec. 582.

[90]Lewis v. Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384.

[91]Cain v. Higland Co., 134 Minn. 363, 159 N. W. 830, 872.

[92]Missouri Lbr. Co. v. Chronister (Mo.), 259 S. W. 1042.

[93]Ramsey v. Wilson, 52 Wash. 111, 100 Pac. 177.

[94]Jasperson v. Scharnikow, 150 Fed. 571, 572, 15 L. R. A. (N. S.) 1178.

It should be noted that the learned judge says "when he goes upon land that does not belong to him," for good faith is essential only in the making of the claim, and if during the running of the period, it is established that the claim is without foundation, the circumstances may warrant claimant's maintenance of the same nevertheless. Acquiescence by his neighbor may have led him to act to his detriment, and the circumstances may warrant his insisting that the status quo which he honestly but wrongfully created be maintained.

Whether or not the five essentials of adverse possession are satisfied is obviously difficult of determination but is relatively easy as compared with the characterization of an entry as being in good or bad faith, which is largely a matter of fact for the jury.[95] If it depended entirely upon the evidence linked closely to the original entry, the lapse of years would add to the difficulties involved.

The engineer has the advantage of the court in judging the good faith of a possession. In a boundary dispute he sees the first reaction of the contending parties, and can then form a reasonable conclusion as to the honesty of the party who by the established facts is adversely claiming. This is illustrated in a case where an engineer was called by a very adamant client to come at once and make a survey so that he might resist the encroachment of a driveway being built by his neighbor. The urgency of the appeal did not permit careful preparation, but the engineer had made a survey of a nearby property, and a preliminary investigation revealed the driveway to be better than five (5) feet from the line. When the client was advised of this fact his hostility immediately subsided, but his good faith was evidenced by his willingness to pay for a more careful survey to verify the conclusion despite the ample margin to

[95]Lee v. O'Quinn, 103 Ga. 355, 30 S. E. 356.

provide for slight inaccuracies. In this case both parties were in good faith claiming to wrong and conflicting lines, and neither to that which was correct. On the other, the good faith of the man who approaches the engineer and while emphasizing that he wants only the frontage his deed gives him, instructs him to make the survey so as to place at least ten (10) feet to the west of the house in order to give room for a driveway, is very questionable.

Good faith is admittedly hard to judge, but this fact does not justify discarding it as a necessary element, and its existence should be established before the test determining whether the five essentials are satisfied is applied. It is only necessary that the entry be in good faith for when a man has honestly committed himself circumstances may justify him in sticking to his wrongful claim. The legislatures as well as the courts have recognized that good faith is essential and some statutes expressly provide that to acquire property adversely, the possession must be lawful, which means in good faith claiming as owner,[96] and not as a mere intruder or trespasser. Color of title is sufficient to support a possession and make it lawful,[97] but it is not essential, and an honest claim of title is sufficient.

V. AGAINST WHOM ADVERSE POSSESSION DOES NOT RUN.

[§ 347.] The statute of limitations does not operate against the United States.[98] In the absence of statute to the contrary the same is true in regard to the state,[99] and where the statutes are expressly made to apply to land held

[96]Abeles v. Pillman, 261 Mo. 359, 168 S. W. 1180, 1184.

[97]Dunnington v. Hudson, 217 Mo. 93, 116 S. W. 1083.

[98]Stanley v. Schwalby, 147 U. S. 508, 514, 37 L. ed. 259, 13 Sup. Ct. 418; Northern Pac. R. Co. v. Cash, 67 Mont. 585, 216 Pac. 782.

[99]State v. Scott, 89 Wash 63, 154 Pac. 165, 169; Virginia Hot Springs Co. v. Lowman, 126 Va. 424, 101 S. E. 326; People v. Baldwin, 197 App. Div. 285, 188 N. Y. S. 542.

by the state, the usual construction is that they apply only to lands held in a private or proprietory manner, and not to those dedicated for a public use.[1]

The weight of authority based either upon the common law or specific statutes maintains that lands held by a municipality or quasi municipal corporations as trustees of the public rights can not be acquired by adverse possession.[2] In 1914 only seven states held or had held to the contrary, and some of these have since reversed their position by statute.[3] However under certain circumstances[4] such as the holding adversely for the statutory period prior to the enactment of a statute exempting such public land from limitations, the rule does not apply.[5] The rule does not apply prior to the acceptance of a street, for until then the municipal authorities can exercise no authority over it, and it may be adversely acquired,[6] and where competent authority abandons a way, title to the same may be gained by adverse possession.[7] One reason for the rule is suggested in the statement. It is also justified by its necessity. The private owner can protect his interests, but public affairs are the business of no one in particular, and negligence in asserting the public rights can not be placed

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[1]People v. Banning Co., 167 Cal. 643, 140 Pac. 587.

[2]Porter v. Stuttgart, 135 Ark. 48, 204 S. W. 607; Larkey v. Los Angeles, 70 Cal. App. 635, 233 Pac. 991; DeLand v. Dixon Power &c. Co., 225 Ill. 212, 80 N. E. 125; Princeton v. Hanna, 187 Ind. 582, 113 N. E. 999; 120 N. E. 598; Pine v. Reynolds, 187 Iowa 379, 174 N. W. 257; Attwill v. B. &c. Co., 246 Mass. 292, 140 N. E. 928; Pastorino v. Detroit, 182 Mich. 5, 148 N. W. 231; Marshall v. Springfield (Mo.), 221 S. W. 17; Mt. Pleasant v. New York, 199 App. Div. 315, 191 N. Y. S. 741; White v. Edenton, 173 N. Car. 32, 91 S. E. 601; Grady v. Greenville, 129 S. Car. 89, 123 S. E. 494; Laredo v. DeMoreno, Tex. Civ. App., 183 S. W. 827; Jones v. Clarksburg, 84 W. Va. 257, 99 S. E. 484; Klinkert v. Racine, 177 Wis. 200, 188 N. W. 72.

[3]Pastorino v. Detroit, 182 Mich. 5, 148 N. W. 231.

[4]La Barre v. Bent, 154 Mich. 520, 118 N. W. 6.

[5]Little Rock v. Galloway, 162 Ark. 329, 258 S. W. 356; Neblett v. R. S. Sterling Inv. Co. (Tex. Civ. App.), 233 S. W. 604; Vier v. Detroit, 111 Mich. 646, 70 N. W. 139.

[6]Scott v. Donora Southern R. Co., 222 Pa. 634, 72 Atl. 282.

[7]Red Bluff v. Walbridge, 15 Cal. App. 770, 116 Pac. 77.

upon the community, for what is everybody's business is no one's business. In the larger cities the engineer can not act as a watchdog of the street lines, and this reason still exists.

The doctrine exempting municipalities from the operation of limitations is sound, but it is self evident that where the competent authorities of a city have by their action misled private parties, the unqualified application would result in injustice. This condition is recognized, and it is held that while a city can not be debarred from asserting its title to land held in trust for public purposes by the mere laches on its part or on the part of its officers, certain cases arise of such a character that justice requires that an equitable estoppel should be asserted even against the public.[8] The action relied upon to set the principle of estoppel in operation must be taken by parties having competent authority such as the mayor or council,[9] or by some responsible officer in the performance of his delegated duties. Thus where a party in compliance with the local statutes obtained a building permit from the mayor and built to a street line laid down by the city engineer as required by ordinance, the city was estopped to claim a part of the property as a public highway and to remove the building therefrom.[10] However the doctrine of equitable estoppel is set in operation only by the affirmative actions of the city authorities.[11] Thus where an adverse claimant in compliance with the statutes gave notice to the city engineer of his intention to build, and received no reply, and two years later began and completed construction it

[8]Paine Lbr. Co. v. Oshkosh, 89 Wis. 449, 61 N. W. 1108. Von Tobel v. Lewistown, 41 Mont. 226, 108 Pac. 910, 137 Am. St. 733.

[9]Wall v. Salt Lake City, 50 Utah 593, 168 Pac. 766.

[10]Krause v. El Paso, 101 Tex. 211, 106 S. W. 121, 130. Am. St. 831, 14 L. R. A. (N. S.) 582.

[11]Galveston H. &c. R. Co. v. Eagle Pass (Tex. Civ. App.), 249 S. W. 268; Kanall v. Wright, 137 Wash. 661, 244 Pac. 245.

was held that estoppel did not apply.[12] Furthermore the rights of a city in duly platted streets and alleys will not be deemed surrendered by estoppel in pais without such acts by the city as to work injustice and hardship upon the parties relying upon the inequitable conduct of the city.[13] Land held by municipal corporations as of private ownership may be acquired adversely by individuals.[14] The principals regarding the application of adverse possession against a city apply to the county.[15] The statute does not run against the grantees of the state or federal government until the issuance of the patent.[16] Although under the direct provision of statutes in certain jurisdictions title can not be acquired by adverse possession to property granted and held for a pious use,[17] it is elsewhere held that religious societies and their trustees may acquire property by adverse possession and that the statute of limitations acts against as well as in favor of such organizations.[18] This holds although the corporation is expressly forbidden to convey its lands.[19] Title to cemetery land can not be acquired by adverse possession,[20] but this does not apply where the cemetery is abandoned and the bodies removed.[21] Some authorities reason that as the right of way of a railway is held for public purpose, or that the right of way

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[12]Providence v. Comstock, 27 R I. 537, 65 Atl. 307.

[13]Klinert v. Racine, 177 Wis. 200, 188 N. W. 72.

[14]New York v. New York Cent. R. Co., 198 App. Div. 517, 190 N. Y. S. 777; Chicago v. Middlebrooke, 143 Ill. 265, 32 N. E. 457.

[15]Johnson v. Llano County, 15 Tex. Civ. App. 421, 39 S. W. 995; Chicago v. Middlebrooke, 143 Ill. 265, 32 N. E. 457; Galveston H. &c. Co. v. Eagle Pass (Tex. Civ. App.), 249 S. W. 268; Placer County v. Lake Tahoe R. &c. Co., 58 Cal. 764, 209 Pac. 900; Reynolds v. Ellison (Mo.), 225 S. W. 948.

[16]Denver &ç. Co. v. Wilson, 28 Colo. 6, 62 Pac. 843; Hemphill v. Moy, 31 Idaho 66, 169 Pac. 288. See also N. Pac. Ry. Co. v. Pyle, 19 Idaho 3, 112 Pac. 678.

[17]Davis v. Union Meeting House Soc., 93 Vt. 520, 108 Atl. 704.

[18]Young v. Knox, 165 Ark. 129, 263 S. W. 52.

[19]Reformed Church v. Schoolcraft, 65 N. Y. 134.

[20]Van Buskirk v. Standard Oil Co., 94 N. J. Eq. 686, 121 Atl. 450.

[21]Van Buskirk v. Standard Oil Co., 100 N. J. Eq. 301, 134 Atl. 676.

is by statute a public highway, it can not be acquired adversely,[22] and in a few jurisdictions the station grounds and depot are likewise exempt.[23] Other authorities maintain that the right of way is held and used for the benefit of the stockholders,[24] and that the land within the right of way may be acquired adversely.[25]

Aside from all legal reasons plain fair play suggests that land within the right of way should under some circumstances not be subject to the statutes of limitations. In open country it is impossible for such a corporation to guard its possessions, and it should be sufficient if they maintain monuments as muniments of boundary and are prepared to prove the limits of their possessions when occasion arises. On the other hand in cities where inches count, railroads should not be given special privileges. The exemption allowed in the open country should place a greater responsibility upon them to protect their rights where land values are high. Local conditions are not amenable to rules of law, but must be considered and may be controlling.[26]

In the western states there are particular rights of way granted by the federal government to railroad companies, the title of which remain in the government, or the grants are in trust for a particular use, and therefore adverse possession does not run against the railroad company.[27] Where the right of way is an easement the use by the owner of the subservient estate is presumed permissive, and limita-

[22]Western N. Y. &c. R. Co. v. Vulcan Foundry &c. Co., 251 Pa. 383, 96 Atl. 830; Mobile &c. R. Co. v. Strain, 125 Miss. 697, 88 So. 274.

[23]St. Joseph, St. L. &c. R. Co. v. Smith, 170 Mo. 327, 70 S. W. 700; Durham v. S. R. Co., 121 Fed. 894. See also May v. Atlantic Coast Line R. Co., 151 N. Car. 388, 66 S. E. 310; Drouin v. Boston &c. R. Co., 74 Vt. 343, 52 Atl. 957.

[24]Pittsburg C. C. &c. R. Co. v. Stickley, 155 Ind. 312, 58 N. E. 192.

[25]Raton v. Pollard, 270 Fed. 5; Northern R. Co. v. Demarest, 94 N. J. L. 68, 108 Atl. 376; Texas &c. R. Co. v. Belcher (Tex. Civ. App.), 226 S. W. 471.

[26]See Baker v. DeArmijo, 17 N. Mex. 383, 128 Pac. 73 (§ 336, supra.)

[27]St. Louis-San Francisco R. Co. v. McBride, 104 Okla. 216, 231 Pac. 284.

tions begin to run only from time the railroad company has notice of the adverse claim.[28] Title to the general lands of a railway company not including its right of way and similar lands may be acquired by adverse possession.[29] It has been held in Massachusetts that the operation of a relative statute exempts any land which a railroad is empowered to acquire whether or not it was within the right of way or was acquired by condemnation.[30]

Where the adverse possession is sufficient to bar the legal estate of the trustee, it will bar the equitable estate of the cestui que trust,[31] even though the latter is under some disability[32] or coverture; but this rule does not hold unless the legal title is in the trustee.[33] By statute in some states an infant against whom an adverse possession has ripened in his infancy has a stated time after reaching his majority to institute suit and defend his title.[34]

VI. WHO MAY ACQUIRE PROPERTY BY ADVERSE POSSESSION.

[§ 348.] The United States when holding through its officers and agents who are subject to action by owner for its recovery may acquire title by adverse possession.[35] A state[36] and a municipality[37] may also acquire land by adverse possession. In connection with municipalities it must be borne in mind that conditions make it necessary to sub-

[28]Dulin v. Ohio River R. Co., 73 W. Va. 166, 80 S. E. 145, L. R. A. 1916B, 653, Ann. Cas. 1916D, 1183; Southern R. Co. v. Vann, 142 Tenn. 76, 216 S. W. 727; Seaboard Air Line Ry. v. Banks, 207 Ala. 194, 92 So. 117.

[29]Delaware L. &c. R. Co. v. Tobyhanna Co., 228 Pa. 487, 77 Atl. 811, 21 Ann. Cas. 161.

[30]Boston &c. R. Co. v. Reardon, 226 Mass. 286, 115 N. E. 408.

[31]Jones v. Rountree, 138 Ga. 757, 76 S. E. 55.

[32]Appel v. Childress, 53 Tex. Civ. App. 607, 116 S. W. 129.

[33]Smith v. Price (Tex. Civ. App.), 230 S. W. 836.

[34]King v. Carmichael, 136 Ind. 20, 35 N. E. 509, 43 Am. St. 303.

[35]Stanley v. Schwalby, 147 U. S. 508, 519, 37 L. ed. 259, 13 Sup. Ct. 418.

[36]Brunett v. Rochester, 124 Misc. 209, 207 N. Y. S. 232.

[37]New York v. Carleton, 113 N. Y. 284, 21 N. E. 55.

ordinate private rights to the public weal. Although land in the bed of the street can not be acquired adversely, this fact does not justify the converse that private land can not be acquired for street purposes. If the doctrine of adverse possession does not apply in such cases, the principles of estoppel operate to debar the title owner, and to at least confer upon the general public an easement in the land adversely used for street purposes. Prescription is a most unsatisfactory manner of establishing streets or alleys, but necessary to maintain the public's right. Railroad companies[38] and other corporations can in general acquire property by adverse possession,[39] and in most jurisdictions this is true even when the corporation in question has the power of eminent domain,[40] but in some it is held that as owner has no power to prevent the entry and continued possession by such corporations, they can not acquire land by adverse possession.[41] A non-resident of a state may maintain actual possession through an agent or tenant,[42] and the property held by a non-resident may be acquired by adverse possession.[43] Some statutes provide for the suspension of the running of the statute of limitations during the absence of the party holding adversely.[44]

VII. EXTENT OF ADVERSE POSSESSION.

[§ 349.] (A) **Under Claim of Title.**—Where two are in possession seisin follows the title,[45] and that land which is not in the actual possession of anyone is by construction

[38]Munroe v. Pere Marquette R. Co., 226 Mich. 158, 197 N. W. 566; Cross v. Seaboard Air Line R. Co., 172 N. Car. 119, 90 S. E. 14.

[39]Mills v. Trustees of Zion Chapel, 119 Md. 510, 87 Atl. 257.

[40]Webster v. International &c. R. Co. (Tex. Civ. App.), 193 S. W. 179; American Bank-Note Co. v. New York El. R. Co., 129 N. Y. 252, 29 N. E. 302.

[41]Narron v. Wilmington &c. R. Co., 122 N. Car. 856, 29 S. E. 356, 40 A. L. R. 415.

[42]St. Paul v. Chicago M. &c. R. Co., 45 Minn. 387, 48 N. W. 17.

[43]Work v. United Globe Mines, 12 Ariz. 339, 100 Pac. 813; Mining Co. v. Taylor, 100 U. S. 37, 25 L. ed. 541.

[44]Bateman v. Jackson (Tex. Civ. App.), 45 S. W. 224.

[45]Towle v. Quante, 246 Ill. 568, 92 N. E. 967.

of law deemed to be in the legal owner,[46] but the rightful owner's constructive possession ceases to the extent of the dispossession as soon as another takes actual possession.[47] These simple principles define the limits under claim of title and considered simultaneously establish that where possession is held under mere claim of title it is limited to the land actually possessed.[48] Furthermore the legal owner need only to look to the land itself for claims of the adverse possession,[49] and when an entry is not under color of title there is no invasion or disseisin which notifies the true owner of a claim by another person or which gives him a right of action except to land actually occupied, and therefore adverse claimant is limited to his occupancy.[50] Regardless of occupancy or non-occupancy of the senior claimant there can be no constructive possession without color of title, and while this is not a necessary element of adverse possession it is essential to extend the claim beyond the limits of actual possession.[51] Where the land was wild and uncultivated[52] or no other party was asserting title,[53] it has been held that the possession of one entering the land without a paper title extended to the marked boundary of the same, especially where this was well defined.[54] But these cases are clearly exceptions.

An old Indiana decision makes an exception where a railroad is claiming its right of way without color of title and holds that such an appropriation extended the bounds to the full width of the right of way as fixed in the company's

[46]State v. Willoughby, 7 Boyce (Del.) 83, 102 Atl. 983.

[47]New York Cent. &c. R. Co. v. Brennan, 24 App. Div. 343, 48 N. Y. S. 675; Tennis Coal Co. v. Sackett, 172 Ky. 729, 190 S. W. 130.

[48]Taylor v. Breathitt Coal, Iron &c. Co., 185 Fed. 854, 860.

[49]Brewer v. War Fork Land Co., 172 Ky. 598, 189 S. W. 717.

[50]Barber v. Robinson, 78 Minn. 193, 80 N. W. 968.

[51]McCurdy v. Rich, 76 Ind. App. 469, 132 N. E. 315; Bradbury v. Dumond, 80 Ark. 82, 96 S. W. 390, 11 L. R. A. (N. S.) 772.

[52]Pratt v. Ard, 63 Kans. 182, 65 Pac. 255; Sage v. Morosick, 69 Minn. 167, 71 N. W. 930.

[53]Richie v. Owsley, 137 Ky. 63, 121 S. W. 1015.

[54]Lang v. Clark, 85 Vt. 222, 81 Atl. 625. See also § 340, supra.

charter,[55] but it is more generally held that the usual rule applies and the boundaries are limited to the actual possession.[56] The acquisition of color of title by one who has entered and held to certain limits by actual possession under claim of title does not extend the bounds of the possession.[57] Color of title alone is insufficient for the acquisition of property by adverse possession, and the entry can not be brought forward to connect with the color of title and extend the bounds to those laid down in the instrument giving color of title, and obviously the description of this instrument can not be referred back to the act of entry.[58] As color of title is created by an instrument which upon its face is regular there is no reason that the construction of the description as stated in the paper giving color of title should not be according to the recognized rules of construction,[59] unless some rule of law such as the apportionment of excess and deficiency is involved.[60] Intention controls as usual,[61] and the past treatment of the land involved as included within the bounds set forth in the paper giving color of title is sufficient to extend the possession so acquired to include it.[62]

[§ 350.] (B) Under Color of Title.—(1) Construction of Description.—One effect of color of title is to define boundaries of a claim and thus to create a constructive possession covering the land within such boundaries and outside of the actual possession. It is held that a description in an instrument giving color of title must possess the

[55]Prather v. Western Union Tel. Co., 89 Ind. 501.

[56]St. Louis S. W. R. Co. v. Davis, 75 Ark. 283, 87 S. W. 445; Omaha &c. R. Co. v. Rickards, 38 Nebr. 847, 57 N. W. 739; Hines v. Symington, 137 Md. 441, 112 Atl. 814.

[57]Barber v. Robinson, 78 Minn. 193, 80 N. W. 968.

[58]Barber v. Robinson, 78 Minn. 193, 80 N. W. 968.

[59]See §§ 6, 65, supra.

[60]See § 350, infra.

[61]Morgan v. Jenson, 47 N. Dak. 137, 181 N. W. 89.

[62]Clithero v. Fenner, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. 978.

same certainty as is necessary to pass title,[63] and must identify the land,[64] although an indefinite description will suffice if the court can with the aid of extrinsic evidence fit the property to the deed description without in any way changing the latter.[65] The presumption is that the grantee enters into possession under a deed giving color of title claiming title only to the land described therein[66] and a deed (or other instrument) is color of title only to land actually described by it.[67] There would be no certainty in a rule substituting a man's belief for what a deed shows,[68] and therefore the irregularity which makes a paper mere color of title does not justify departure from the rule giving that which is certain control over that which is uncertain.[69]

It has been held that where there is an excess or deficiency the description is not to be construed by taking it by the four corners and reading it,[70] but to first study the situation and then modify the expressed description to fit the ground.[71] Where there is an excess or deficiency this circumstance does not alter the deed description. The owners are rather given a portion of the excess or made to contribute to the deficiency in spite of their title papers.[72] If one places himself in the seats occupied by those engaged in a transaction in which a deed description is by lot and block number with reference to a plat, the natural presumption is that they considered the plan as correct. Therefore

[63]Hanna v. Palmer, 194 Ill. 41, 61 N. E. 1051, 56 A. L. R. 93; Southern Iron &c. Co. v. Stowers, 189 Ala. 314, 66 So. 677.

[64]Griswold v. Comer (Tex. Civ. App.), 161 S. W. 423.

[65]Noland v. Weems (Tex. Civ. App.), 141 S. W. 1031.

[66]Northern Pac. R. Co. v. Cash, 67 Mont. 585, 216 Pac. 782.

[67]In re Watson, 54 Cal. App. 269, 201 Pac. 793; Austin v. Baxter, 189 Iowa 138, 176 N. W. 277; Ipock v. Gaskins, 161 N. Car. 673, 77 S. E. 843; Greathouse v. Linger, 98 W. Va. 220, 127 S. E. 31.

[68]Williamson v. Tison, 99 Ga. 791, 26 S. E. 766.

[69]Luttrell v. Whitehead, 121 Ga. 699, 49 S. E. 691.

[70]See § 65, supra.

[71]See Nilson v. Kahn, 314 Ill. 275, 145 N. E. 340 (§ 220, supra).

[72]See § 215, supra.

regardless of actual conditions they intended to convey according to the dimensions shown thereon especially if the lot is small and of great value. These considerations clearly extend the color of title to limits as fixed by the dimensions shown on the plat. Men do not think in terms of one-tenth or one-twelfth of a block, and when they purchase lots they have in mind improvements, and dimensions are significant. The rule of excess and apportionment must of necessity be applied to title because this is real, but color of title is a fiction, and as fancy can ignore actuality, this rule has no place. Title to a parcel described by lot and block number and reference to a plan is limited to the situation upon the ground, but the extent of color of title of the same should be determined by taking the plan in hand and reading it.

It is interesting to consider how practically the above theory works out. If an owner acquires a lot under a regular deed, and there is a shortage, he is required to contribute his share when he has made no improvements, for color of title without actual possession is of no avail; but if under the construction argued for above, he enters and makes valuable improvements, his color of title now supported by actual and exclusive possession under a notorious claim made in good faith should afford him the advantage of the statute in acquiring the land adversely held in a shortened period.

The above argument is supported by the New Hampshire ruling that a deed description of doubtful meaning gives color of title to the fullest extent of what the deed may be construed to cover.[73]

[§ 351.] (2) Extent of Possession—General Rules.— As a foundation for the consideration of the extent of pos-

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[73]Barker v. Publishers' Paper Co., 78 N. H. 160, 97 Atl. 749, 78 N. H. 571, 103 Atl. 757, L. R. A. 1918E, 709.

session under color of title the pertinent fundamental principles are recapitulated:

(1) When land is unoccupied the ownership is by construction of law in the true owner, or party with better title.[74]

(2) Actual possession under color of title creates a constructive possession of all unoccupied land within the boundaries laid down in the instrument giving color of title.[75]

(3) There can be no constructive possession under color of title without actual possession of a part of the land conveyed by the instrument giving color of title.[76]

(4) It is presumed that the party entering under color of title holds to the boundaries defined by the instrument under which he enters.[77]

(5) The actual possession of the rightful owner overcomes the constructive possession of a party holding under color of title and limits the latter's possession to that land actually held.[78]

These principles are general and apply whether the claim is to—

(1) One lot.

(2) One lot divided into two parts by a natural feature which has the appearance of a boundary.

(3) Several lots under one enclosure but conveyed separately.

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[74]Hominy Creek Land Co. v. Gauley Coal Land Co., 103 W. Va. 477, 138 S. E. 95; Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113.

[75]Devlin v. Powell, 67 Cal. App. 165, 227 Pac. 231; Michigan v. Wisconsin, 270 U. S. 295, 70 L. ed. 595, 46 Sup. Ct. 290.

[76]Henry v. Frohlichstein, 149 Ala. 330, 30 So. 126.

[77]Northern Pac. R. Co. v. Cash, 67 Mont. 585, 216 Pac. 782.

[78]Kentucky Union Co. v. Hevner, 210 Ky. 121, 275 S. W. 513; Howell v. Garlington (Tex. Civ. App.), 270 S. W. 269; Deputron v. Young, 134 U. S. 241, 33 L. ed. 923. 10 Sup. Ct. 539.

(4) Several contiguous lots amalgamated into one tract by the description in the instrument giving color of title.

(5) Several lots held under one instrument but conveyed therein as separate parcels by distinct descriptions.

(6) Several contiguous lots held by various instruments giving color of title.

(7) Several non-contiguous lots under one instrument.

(1) The first case is solved by a direct application of the fundamental principle that actual possession of a part extends the constructive possession to the boundaries called for in the instrument giving color of title except in so far as the land within these bounds is in the actual possession of another.

(2) An appreciation of the fact that the stream or other natural feature dividing the tract into two parcels is of no consequence, because it is non-existent as far as the instrument giving color of title is concerned, at once reduces the second case to the identical situation previously considered, and consequently the same rule applies.[79] However, the presence of the stream may affect the notoriety, and the local conditions must be regarded. A county line crossing the tract is of great significance because of its possible effect upon notoriety if for no other reason.

(3) Where several lots are under one enclosure so that they are converted into one connected body of land, the color of title is the foundation for the constructive possession of that land not occupied, and the amalgamation of the parcels into one lot by the enclosure defines the extent.[80] Enclosure alone is ineffective to make a possession adverse,[81] but with entry under color of title, and actual pos-

[79]Rowan v. Newbern, 32 Ga. App. 363, 123 S. E. 148.

[80]LeMoyne v. Hays, 145 Ky. 415, 140 S. W. 552; Elliott v. Hensley, 188 Ky. 444, 222 S. W. 507.

[81]Appel v. Childress, 53 Tex. Civ. App. 607, 116 S. W. 129.

session of a part of one lot, enclosure serves to extend the constructive possession by defining its boundaries.

(4) Where several contiguous lots are amalgamated into one tract by the description in the instrument giving color of title, the application of the fundamental principles is simple. There is an actual consolidation of the previous subdivisions, an obliteration of the old lines and a creation of a new tract described in the instrument giving color of title.[82] This and the contiguity extend the constructive possession of a part of the new tract to its lines rather than to the former but non-existent lines of the particular lot occupied by actual possession.

(5) Where several contiguous lots are claimed under one instrument giving color of title, but by separate descriptions, it is necessary to consider the significance of the manner of conveyance. The parties to the transaction had the choice of two descriptions, and it is to be presumed that due thought was given to the selection. In Tennessee the conveyance of lands by separate descriptions is regarded as a declaration of a purpose to hold them as distinct tracts, and the contiguity of the location and the inclusion of the several descriptions within one instrument is not considered as sufficient to overcome this presumption.[83] This at once renders the fact that the descriptions are embraced in one instrument of no consequence, and in applying the rules they are regarded as distinct parcels. Actual possession is essential to give color of title effect, and the extension of the constructive possession is limited to the boundaries laid down in the instrument giving color of title. If there are three tracts A, B and C described by separate descriptions in one instrument, the Tennessee construction renders

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[82]Elliott v. Cumberland Coal &c. Co., 109 Tenn. 745, 71 S. W. 749. See Scaife v. Western N. Car. Land Co., 90 Fed. 238, 244.

[83]Round Mt. Lbr. &c. Co. v. Bass, 136 Tenn. 687, 191 S. W. 341.

this of no consequence, and they are distinct. Entry upon A does not give color of title to B or C effect, and the constructive possession is limited to the boundaries called for in the instrument by which the claim is supported by actual possession, namely A. The grantee has recognized B and C as distinct from A, and no act confined to the land within A can give effect to the color of title of tracts B and C. In Tennessee it is so held.

In a Georgia case where the lots were not contiguous and therefore not within this classification the court upheld the Tennessee reasoning. The syllabus by the court reads in part: "It is only where all of the lots are conveyed as one tract of land that the statute makes the conveyance color of title to extend over them all, and constructively, by the possession of one, extends the grantee's possession to all within the boundaries of the one tract described by the deed. (Barber v. Shaffer, 76 Ga. 285.)"[84]

The necessity of actual amalgamation is well illustrated in Tucker v. Wimpey[85] where the deed read in part "being whole lots Nos. 212, 249, 250, 251, 253, 252, 256, 257, 213, and containing 202½ acres each, and aggregating 1,822½ acres. Also the following portions of lots, to wit: 181 acres of lot No. 254, 198 acres of lot No. 255, * * *; said fractions of lots containing 774 acres." It was held under these facts that the actual possession of a part of the whole lots extended the constructive possession to the entire 1,822½ acres as laid down by the original survey for the deed established this as one tract, but that such possession of parts of the whole lots would not, under color of title, extend by construction to the fractional lots which were not united to the former by the deed description.

(6) Where the tracts are contiguous but held under separate instruments the reasoning of the previous case applies

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[84]Georgia Minerals Co. v. Cox, 154 Ga. 861, 115 S. E. 770.

[85]158 Ga. 820, 124 S. E. 692.

without any presumptions. On the record the tracts are distinct, and a search of the same may in no way suggest the contiguity. If one or more instruments were not on the record, the amalgamation of the tract would not be apparent. The rightful owner need only to look to the land itself for actual acts of adverse possession.[86] Imagine three contiguous tracts A, B and C, the last an undeveloped lot held by M, (who lives nearby), under clear title and all three by N under color of title. M sees N enter upon tract A and knowing the bounds of the same disregards the matter, or if he looks up the record finds that the limits of the constructive possession under such entry, which only gave effect to the color of title pertaining to tract A, are remote from his tract C.[87] There is nothing to make the possession of tracts B and C notorious as is essential. This test depending only upon the application of universally recognized principles establishes that the actual possession of a part of one tract contiguous to others held by the same claimant under separate instruments giving color of title does not extend the constructive possession to the outer boundaries of the contiguous tracts, but only to the boundary of the tract occupied.

The law in regard to this situation has been otherwise in Kentucky where a long line of cases established that the actual possession of a part of one tract extended the constructive possession to the outer bounds of the contiguous tract held by the claimant under separate instrument giving color of title.[88] In this state it has always been recognized that "without actual possession of some part of a tract of land, there can be no constructive possession of any part by one without title or having mere color of title under deed, patent, or other instrument," but it has in the past

[86]Brewer v. War Fork Land Co., 172 Ky. 598, 189 S. W. 717.

[87]See § 350, supra.

[88]Taylor v. Asher, 286 Fed. 721, 726.

been held that "having already the constructive possession, by reason of being the owner of titles, the law waives the necessity of an entry upon each of the newly acquired tracts, and an *actual possession* which he has of the tract contiguous to them is extended over all of them by operation of law."[89] This reasoning is dogmatic and ignores the rights of the title claimant. Therefore it is gratifying to note that Chief Justice Carroll has disregarded the precedent of parallel cases, and, by precedent of recognized fundamental principles, has brought Kentucky practice in harmony with sound reasoning. In Elliott v. Hensley,[90] the learned judge characterizes the Kentucky practice as not in accord with the weight of authority and indorses the law as above set forth.

(7) Contiguity is an essential to extend the actual possession in one lot to the boundaries of another, and where parcels are non-contiguous, the constructive possession is not extended although the descriptions are included within one instrument giving color of title.[91] Thus in Georgia in a situation where the lots were not contiguous, it was held that "where a deed did not convey or purport to convey one tract of land embracing the lots stated therein as one whole body of land, consisting of so many acres, but conveyed several distinct 'tracts or parcels' possession of one of the tracts or parcels named did not, by construction, extend over the others under color of title"[91a] for contiguity is essential,[92] and shoestring ties relied upon to establish contiguity are not sufficient.[93] Nevertheless a common cor-

[89]Tennis Coal Co. v. Sackett, 172 Ky. 729, 190 S. W. 130, 138.

[90]188 Ky. 444, 222 S. W. 507. See G. F. Stearns Land &c. Co. v. Asher, 295 Fed. 268. 274, 275.

[91]Dow v. Dow, 243 Mass. 587, 137 N. E. 746.

[91a]Georgia Minerals Co. v. Cox, 154 Ga. 861, 115 S. E 770.

[92]Barber v. Shaffer, 76 Ga. 285; Leader Realty Co. v. Lakeview Land Co., 133 La. 646, 63 So. 253.

[93]G. F. Stearns Land &c. Co. v. Asher, 295 Fed. 268.

ner,[94] and a boundary of short length, have been held to maintain contiguity.[95]

A long line of Texas decisions maintains that where a tract of land is subdivided and sold to different parties, a subsequent purchaser under deed conveying him the whole, can not claim by limitation those subdivisions on which he has never entered.[96] This statement of the law is unquestionably too broad, and as pointed out in Surghenor v. Ducey[97] the rule as stated does not apply when both parties claim the entire body of land regardless of the subdivision.

Situations arising by the purchase of all unsold lots in a subdivision, or blocks in the same are to be regarded as several parcels conveyed by one instrument and the extent of the constructive possession determined by the rules pertinent thereto. If the instrument giving color of title actually amalgamates the lots by declaring them to be all of the unsold lots, the determination depends upon the contiguity. If the subdivision is urban and is cut by streets, the effect of these is interesting. It may be that nothing in the deed suggests these as boundaries, and as fee passes in most cases to the center of the street, the contiguity between lots in different blocks is unbroken. Rather than tamper with the delicate rules regarding extent of constructive possession it is better to approach this detail from the standpoint of notoriety. An entry in one block may be sufficient to extend the constructive possession to all lots not in the actual possession of another or the constructive possession of one holding paramount title, but not be notorious enough to maintain a claim of adverse possession of lots in other blocks. The subdivision of land by one having color of title

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[94]Parsons v. Dils, 172 Ky. 774, 189 S. W. 1158.
To the contrary, Barber v. Shaffer, 76 Ga. 285.

[95]Leader Realty Co. v. Taylor, 147 La. 256, 84 So. 648.

[96]Southwestern Land Co. v. Evans (Tex. Civ. App.), 275 S. W. 1078; Turner v. Moore, 81 Tex. 206, 16 S. W. 929.

[97](Tex. Civ. App.), 139 S. W. 22.

into lots as shown on a map does not in any manner affect the extent of his color of title, which remains as before, even though his actual possession is confined to one lot of the paper subdivision.[98]

[§ 352.] (3) **Mixed Possession.—(a) General.**—Inasmuch as part of the confusion in regard to adverse possession arises from the shades of meaning of the words used, the terms occurring in the following discussion will be defined. Ownership is to be understood to mean the state, relation, or fact of having a lawful claim or title. Ownership signifies the right of possession or use and control of the land owned, but is not synonymous with possession. An owner is one who has a lawful claim or title. The ownership may be absolute, that is free from imperfection as when it is supported by perfect, or true, title. It may be paramount, that is superior to all others, as when resting upon the best claim of title, or it may be inferior, as when founded upon a weaker claim of title. Possession is to be distinguished from ownership, and is to be understood to mean a use of the land, whether supported by ownership or not. An owner may not have possession, but he has the right of possession at all times. Possession may be evidenced by the erection of improvements, the cultivation of the land, or any act from which the user derives benefits. Actual possession is a real use, and constructive possession is a creation of law and is to be understood to mean a control over land not in actual use by the party, founded upon the fact that his title declares the ownership to be in him. Use and assertion of ownership are the essential elements of actual possession, a presumptive right to use at any time, and a legal presumption of ownership founded upon the de-

[98]Alsworth v. Richmond Cedar Works, 172 N. Car. 17, 89 S. E. 1008.

scription in the instrument supporting title are the distinguishing characteristics of constructive possession.

Seisin is ordinarily defined as possession with intent on the part of him who holds it to claim a freehold interest, and in some jurisdictions means merely ownership.[99] It is here used in the sense of "seisin in law," that is the right of immediate possession or use, and the control over land. The use therefore is closely synonymous with ownership, the right to possess.

The situations arising in connection with mixed possession are greatly reduced in number by the rule of common sense and of law that color of title is ineffective to give constructive possession to holder of such unless the claim is supported by possession.[1] Mere color of title constitutes a potential constructive possession, entry under which converts this potentiality into a reality.

Therefore the factors to be regarded in considering mixed possession are extent of the actual possession of each of the claimants, and effect of this with reference to the overlap in particular, the effect of the senior claimant having no actual possession, and the relative strength of the constructive possession of the senior and junior claimants, particularly when the senior claimant has no actual possession.

[§ 353.] (b) Constructive Possession of Overlap Always in Senior.—In Figure 58 are shown the various situations which commonly arise, in whom the constructive possession is adjudged, and the basis for the conclusion. It is interesting and significant to note that in all cases the senior claim to the constructive possession in so far as it is not actually occupied by the adverse claimant is supported by the same reason, which has been expressed by

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[99]Bouvier's Law Dictionary, Baldwin's Ed.

[1]McBurney v. Knox, 111 Tex. 510, 241 S. W. 1000.

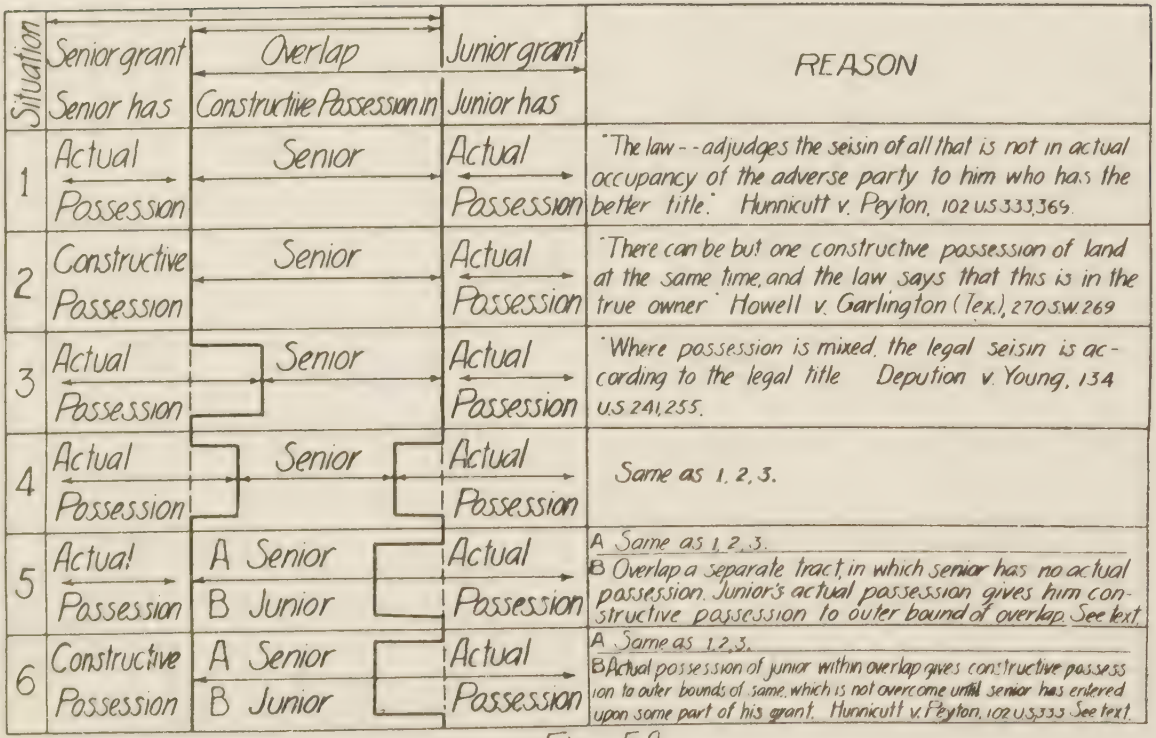
Situation
Senior grant
Senior has
Overlap
Constructive Possession in
Junior grant
Junior has
REASON
1
Actual Possession
Senior
Actual Possession
"The law - - adjudges the seisin of all that is not in actual occupancy of the adverse party to him who has the better title." Hunnicutt v. Peyton, 102 U.S. 333, 369.
2
Constructive Possession
Senior
Actual Possession
"There can be but one constructive possession of land at the same time, and the law says that this is in the true owner." Howell v. Garlington (Tex.), 270 S.W. 269
3
Actual Possession
Senior
Actual Possession
"Where possession is mixed, the legal seisin is according to the legal title." Depution v. Young, 134 U.S. 241, 255.
4
Actual Possession
Senior
Actual Possession
Same as 1, 2, 3.
5
Actual Possession
A Senior
B Junior
Actual Possession
A Same as 1, 2, 3.
B Overlap a separate tract, in which senior has no actual possession. Junior's actual possession gives him constructive possession to outer bound of overlap. See text.
6
Constructive Possession
A Senior
B Junior
Actual Possession
A Same as 1, 2, 3.
B Actual possession of junior within overlap gives constructive possession to outer bounds of same, which is not overcome until senior has entered upon some part of his grant. Hunnicutt v. Peyton, 102 U.S. 333. See text.

Fig. 58

high authority with varying phraseology. The reason is in reality axiomatic, and therefore not to be denied. The principles assisting in the application of this axiom will be developed in showing that those conclusions giving the junior claimant constructive possession are in error.

[§ 354.] (c) Constructive Possession in Junior Falsely Founded.—In Currie v. Gilchrist,[2] the learned judge said, "The lappage in such a case is regarded practically as a separate and distinct tract, so that color of title by the defendant (junior) will ripen into a perfect title by a sufficient adverse possession the same as if he had a separate deed for that part of the land." The facts do not support this premise for the adverse claimant does not have a separate deed, but accepting the false premise as true, the law does not support this conclusion, for the title of the adverse claimant to this nonexistent third tract is inferior to that of the senior claimant, and the acknowledged axiom at once places the constructive possession of the non-existent third tract in him who has better title, namely the senior. The learned judge made one other error. In the dicta of the decision he outlined situation four and supported the conclusion that the senior claimant has constructive possession of all the overlap not occupied by the junior. Situations four and five differ in one immaterial detail of fact, namely the extent of the senior's actual possession. When the fundamental axiom is applied, this is of no consequence, for it is not involved. Both have constructive possession of the overlap, and it is adjudged by law to him with the better title. The junior needs possession within the overlap to give birth to his constructive possession, but the senior has this regardless of his actual possession within or without.

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[2]147 N. Car. 648, 61 S. E. 581, 583.

Other decisions in harmony with the erroneous conclusion state or absolutely imply that where a claimant under color of title is in actual possession of a part of the premises which he occupies, he is in actual possession, by construction, of the remainder of the tract where same is not in possession of another.[3] This is false because while the law may give a man the right of possession or use, it can not create a nonexistent use. The junior claimant alone can make a constructive possession an occupancy in reality. The junior's patent is void to the extent of the conflict,[4] which is the converse of the axiom, and the junior's total possession in the overlap is limited to that which is in fact real. The last situation at first seems logical. "In Altemus v. Long (4 Pa. St. 254) it was ruled that though an actual possession under a junior patent of part of a tract of land, which interfered with an older grant, gave possession of the whole to the junior title, yet a subsequent entry of the true owner upon any part of his land was an ouster of the intruder from what he had in constructive possession merely."[5] The conclusion is sound, but the nonpertinent statement first made is not. The axiom and the converse place the constructive possession in the senior regardless of his actual possession. The six situations are one in applying the law. The legal situations suggested and analyzed in the encyclopediæ and digests number at least eight, but in the application this is hairsplitting without avail. The law is that the senior claimant with paramount title has actual possession of land used in fact and constructive possession to the limits of his grant except in so far as the junior with

[3]Tennis Coal Co. v. Sackett, 172 Ky. 729, 190 S. W. 130; McQueen v. Graham, 183 N. Car. 491, 111 S. E. 860, 861; Hominy Creek Land Co. v. Gauley Coal Land Co., 103 W. Va. 477, 138 S. E. 95, 96.

[4]Combs v. Adams, 182 Ky. 762, 207 S. W. 691; Bates v. Wright, 201 Ky. 430, 257 S. W. 45.

[5]Strong, J., Hunnicutt v. Peyton, 102 U. S. 333, 369, 26 L. ed. 113.

inferior title is in actual occupancy within the overlap. Analysis and simplification reduce the conflict of the law.

[§ 355.] (d) **Lappage Must Be Actual.**—Men do not purposely create lappages when conveyancing, and therefore the presence of such is a strong presumption of an error in applying the deed descriptions to the ground, due either to the omission of a fact or an erroneous deed construction. Due consideration to street widening eliminates many an overlap, and where lappage is present in city work, it is well to search the street records, and if a change in the width is found, to see if the deeds of the corner lot subsequent to the change have recognized the effect upon the frontage. Often it will be found that the scrivener has merely copied the dimensions from deeds prior to the change, and that the proper survey must therefore be made from the original side line of the street. The person claiming the lappage should prove same by conclusive evidence, and there can be no overlap resting upon a strained construction of the deed description. The purpose of a survey is to find the facts and to represent the situation upon the ground so that the court may understand the same and judge the relative merits of the cases. As long as men without knowledge of surveying write deed descriptions, there will always be questions of judgment arising in connection with surveys. These should not be decided so as to arrive at a desired conclusion, but rather to ascertain if the intention of the scrivener supports the claim of the contestant. There is room for a difference of opinion in regard to the conclusion in this respect, and this is a proper foundation upon which to base a case. A contest built upon an obvious distortion of facts to support a theory is weak. The engineer is justified in refusing to make a survey undertaken in this spirit. This appears to be self-evident, but nevertheless surveys contrary to the evident construction of a

deed are made to sustain a contention and bring a case before the court.[6]

The existence or nonexistence of an overlap is not always so easy to determine. An actual example of this will be taken from a very questionable case in which the overlappage is extremely doubtful.

The situation is shown in the accompanying sketch in which the more or less deed dimensions at variance with the actual dimensions are given in parentheses. Only three angular measurements were given as indicated, and unfortunately the direction of the disputed line was given in the junior deed as at right angles to the street, and this angle ran back to the first conveyance creating the junior lot. The situation was friendly, and the survey was being made for the senior. The right angle was turned as called for in the junior deed, and it was found that it reduced the senior's rear line 13.77 feet in nineteen (19) feet and increased the junior's 11.77 feet in approximately 64 feet. As

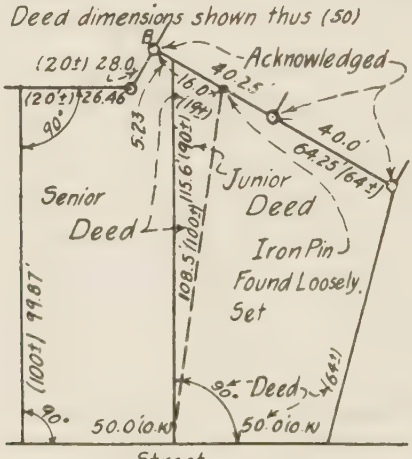

Fig. 59.

[6]See Keefer v. Jamison (Tex. Civ. App.), 199 S. W. 490.

a sixty per cent error in less than twenty feet is rather large for even a scrivener of deeds, the engineer measured 64+ feet from the acknowledged corner B, and beneath a heavy shrubbery found a loosely set iron pin, actually 64.25 feet from B and sixteen (16) feet from A. Neither claimant knew of the pin, but the fact that it was in good line with three commonly acknowledged pins made it appear significant. The disputed line thus determined looked better than the right angle line, but the evidence was not strong. The survey under the senior deed could not be closed by rounding off the more or less dimensions involved. If the proper survey of the senior tract was to run nineteen (19) feet from acknowledged corner B, and to close the survey, without regard to the call for one hundred (100) feet then as the call for the right angle in the junior deed prevailed over the approximate calls for distance in the same because of its greater certainty,[7] there was a conflict. If, on the other hand, the proper survey was to stop at B in laying down the senior grant, and then because of the impossibility of closing, resort to the junior title to locate the boundary, the certain call for course prevailed over all approximate distance calls in both deeds, and the boundary thus established created no overlap in which the senior might have title. The engineer therefore laid the situation before his client, explained the various viewpoints, and suggested that competent legal advice be sought. A week later he was authorized to make further surveys dividing the lappage and to prepare descriptions to be incorporated in quit-claim deeds. Shortly after the case was peacefully settled out of court the engineer chanced to find among the private notes of another, a survey made nineteen years previously showing the pin he discovered in the proper relative position with respect to A and B. The earlier engineer

[7]See § 190, supra.

was a man of experience and exceptional judgment. He knew the rules of construction and presumably had not lightly disregarded the call for the right angle. There was most likely something in existence nineteen years before that convinced him the call for the right angle was inadvertently inserted, or the survey may have been merely an attempt to settle a dispute, for its history is unknown. Surely the senior claimant had a reasonable foundation upon which to base the existence of an overlap, and yet he was well advised to compromise, for the position of a garage and driveway he was about to build was all that was involved. The retention of the goodwill of his new neighbor and the peace he acquired were worth the land he sacrificed.

VIII. RIGHT OR TITLE ACQUIRED.

[§ 356.] Adverse possession which has the requisite elements acts to

(1) Bar the remedy of the holder of paper title,[8]

(2) Extinguish the paper title of the rightful owner,[9]

(3) Vest title in fee in the former adverse owner, and the title so acquired is as perfect as a grant from the state.[10]

The original owner is absolutely divested of all title,[11] and the adverse possessor becomes the fee owner, by cutting off the paper title of the original owner,[12] and establishing by color coupled with actual adverse possession another which

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[8]Marks v. Morgan, 165 Ark. 613, 263 S. W. 970.

[9]Steinwand v. Brown, 38 N. Dak. 602, 166 N. W. 129.

[10]Huber v. Johnson, 174 Ky. 697, 192 S. W. 821.

[11]Northern Pac. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. 302.

[12]Barker v. Publishers' Paper Co., 78 N. H. 160, 97 Atl. 749, 78 N. H. 571, 103 Atl. 757, L. R. A. 1918E, 709.

is in no wise dependent upon the title it has defeated.[13] The title so acquired can only be divested by a written document or another adverse possession,[14] and negotiations,[15] informal agreements,[16] admissions[17] or even recognition of the title of true owner[18] and other acts which would interrupt or weaken an adverse claim while ripening are of no consequence after the fee title has been acquired by the completion of the period.

In boundary work the engineer sees adverse possession as a means of attaining repose by a continual skirmish successfully maintained by the adverse claimant during the statutory period.

The man of the street knows only of the necessity of hostility and interprets this in its strongest sense. He threatens his neighbor and the engineer with heavy artillery, and his wife uses the broom as a weapon of offense. Seldom is the conflict a serious breach of the public peace, but it is an irritation to the neighborhood, and the doctrine makes living nuisances of Godfearing, church-going men and women. The less involved the more is the petty wrangling, and it is only when the land value in question is material that the parties conduct the contest in a manner approaching dignity. It is nineteenth century law designed to quiet title to large tracts in the wilderness of pioneer days, and is a most inefficient and painful method of settling city lot boundaries.

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[13]Coal Creek Consol. Coal Co. v. East Tenn. Iron &c. Co., 105 Tenn. 563, 59 S. W. 634.

[14]Lowi v. David, 134 Miss. 296, 98 So. 684.

[15]Cassidy v. Lenahan, 294 Ill. 503, 128 N. E. 544.

[16]Grim v. Johns, 61 Ind. App. 514, 112 N. E. 13.

[17]Rosenmeir v. Mahrenholz, 179 Ind. 467, 101 N. E. 721.

[18]Blackburn v. Coffee, 142 Ark. 426, 218 S. W. 836.

Adverse possession may have to be relied upon to fix the last few private boundaries that are referred to a horizontal control, but when the latter is available, it is hoped that the courts will discourage this particular method of acquiring land where boundary is concerned.

CHAPTER VIII.

DEDICATION.

I. GENERAL.

Section.
360. General.

II. CAPACITY OF DEDICATOR.

361. Capacity of Dedicator.

III. COMMON LAW DEDICATION.

362. Characteristics.
363. Acts Constituting Common Law Dedication.
364. Intention to Dedicate a Necessary Element.

IV. STATUTORY DEDICATION.

365. General.
366. Nature of Statutory Dedications.
367. Requisites of Statutory Dedication.

V. ACCEPTANCE.

368. General.
369. Necessary Elements.
370. By General Public.
371. By Municipality — Effect of Responsibilities.
372. Capacity of Accepting Body.
373. Acts Constituting Acceptance —General.
374. Statutory Regulations.
375. Extent.

VI. LIMITATIONS.

376. Limitations.

VII. PRESUMPTIONS.

377. Presumptions.

VIII. RIGHTS AND OBLIGATIONS.

378. Of Dedicator.
379. Of Public.
380. Of Third Parties.

IX. REVOCATION.

380.1. Right to Revoke.
381. Acts Constituting Revocation.
382. Statutory Provisions.
383. Effect of Sales with Reference to Plat.
384. Effect of Imposed Conditions.
385. Effect of Statutory Dedication.

X. ABANDONMENT.

386. General.
387. Effect of Acceptance.

XI. MISUSE OR DIVERSION.

388. General.
389. Uses Which Are Diversions.
390. Uses Which Are Not Diversions.
391. Necessary Assent.
392. Proceedings to Prevent Change.

XII. DEDICATIONS A CONCERN OF THE COMMUNITY.

393. Dedication a Concern of the Community.

I. GENERAL.

[§ 360.]—Dedication is the appropriation of land by its owner for any general or public use,[1] the owner reserving to himself no other rights in the soil than such as are perfectly compatible with the full exercise and enjoyment of the public use to which the property has been devoted.[2] The important elements are the intention[2a] to dedicate and the acceptance of the dedication.[3] A consideration is not necessary,[4] for the advantages derived by public use are sufficient.[5] Where an owner accepts higher prices for lots facing a blank square and intimates that such a square is a public park, a dedication is implied.[6]

Regional planning has made dedication particularly important, and suburban development has greatly increased the use of statutory methods. If regional commissions are to function, they must have authority to control the individual plans so that they provide a unified street system with adequate arterial and belt highways. However, statutes can not provide for local conditions. They can only specify the minimum acceptable street widths and lot area and require conformity with the regional plan. Administrative ability must be relied upon to obtain by dedication any land essential for good planning over and above that minimum specified by law. In some instances it may only be necessary to convince the developer that it is to his interests to comply with the plan and to provide wider streets, but where a plan is small the reasonable demands of the public may be excessive unless some consideration is made, which the commissioners may be in a position to

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[1]Gore v. Blanchard, 96 Vt. 234, 118 Atl. 888.

[2]Bushnell v. Scott, 21 Wis. 451, 94 Am. Dec. 555.

[2a]Keppler v. Richmond, 124 Va. 592, 98 S. E. 747.

[3]Hardin v. Ferguson, 271 Mo. 410, 196 S. W. 746; Du Pont v. Miller, 310 Ill. 140, 141 N. E. 423. See §§ 368, 371.

[4]Rees v. Chicago, 38 Ill. 322.

[5]Warren v. Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

[6]Weger v. Delran Township, 61 N. J. L. 224, 39 Atl. 730.

grant as a concession of great benefit to the developer but involving no expense on their part.

The concessions may range from the immediate development of a park or connecting highway, to preference in the installation of water and sewer services. Where the benefit derived is large, and the sacrifice of the subdividor is real, the situation may warrant the assumption of the paving cost if the road involved is an important unit of the regional plan and will be used by fast through traffic which is a detriment to both business and residential property. Needless to say such concessions, which are essentially considerations, are out of the question when regional commissions are handicapped by politics and are available only where a board has gained the confidence of the public by actual accomplishments.

II. CAPACITY OF DEDICATOR.

[§ 361.]—There can be no capacity to dedicate where there is no power to alienate. The dedication must be made by the owner in fee[7] or at least with his assent,[8] or by his authorized agent.[9] Deeds referring to a plat, but given before grantor acquired title do not bind him as an act of dedication;[10] but an unequivocal recognition of the map after purchase would operate as an affirmation of the original intention of dedication and give it full force and effect.[11] Where the owner of a tract has deeded out certain lots prior to the recording of a plat, but these deeds are not placed upon the record until the plat has been filed, there may be a dedication of land within the limits of the deeds, depending upon the facts which establish the time of deliv-

[7]Mulch v. Nagle, 51 Cal. App. 559, 197 Pac. 421; Burleson v. Hamilton, 213 Ala. 198, 104 So. 253.

[8]Lemle v. Louisiana Farm Land Co., 135 La. 757, 66 So. 185.

[9]Nelson v. Madison, 3 Biss. 244, 17 Fed. Cas. No. 10,110.

[10]Nelson v. Madison, 3 Biss. 244, 17 Fed. Cas. No. 10,110.

[11]Nelson v. Madison, 3 Biss. 244, 17 Fed. Cas. No. 10,110.

ery of the deeds.[12] An administrator has no power to dedicate any of his decedent's land to public use.[13] Ordinarily a corporation can dedicate[14] unless prohibited by its charter.[15] To bind a corporation beyond revocation the dedication must be by the directors, or recognized by them in some manner, or be justified by the inference of such ratification,[16] for the mere act of officers or agents making a dedication without authority will not bind the corporation unless there is an implied ratification on the part of the directors.[17] Just how far a corporation is bound by the acts of its officers depends upon the circumstances of the particular case, but when the use is opened by an officer and is enjoyed by the public, the assent of the corporation will be presumed.[18] If the dedication is consistent with and in furtherance of a trust, a trustee may dedicate,[19] but in general the legal title is subject to the trust which can not be transcended by devoting the property even to a public use.[20] This applies to the trustees of a town site and the trustees of a school board can not dedicate school land for road purposes.[21] Where the statutes vest the school trustees with authority to use discretion in the disposal of school lands, it is within their authority to divide the land into lots and blocks and to dedicate the necessary land for streets.[22]

If the land belongs to several persons who have estates and interests in it, there can be no valid dedication except

[12]Counselman v. Wisconsin Lime &c. Co., 299 Ill. 84, 132 N. E. 289.

[13]Davis v. Bonaparte, 137 Iowa 196, 114 N. W. 896.

[14]San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542; Victoria v. Victoria County (Tex. Civ. App.), 115 S. W. 67 (reversed 103 Tex. 477, 128 S. W. 109); Duke Land &c. Co. v. Murphy, 179 N. Car. 133, 101 S. E. 497.

[15]Richmond v. Mayo Land &c. Co., 120 Va. 545, 91 S. E. 615.

[16]Briers v. Alderson, 101 W. Va. 662, 133 S. E. 373.

[17]Lehigh &c. R. Co. v. Warwich, 164 App. Div. 55, 149 N. Y. S. 378.

[18]Duke Land &c. Co. v. Murphy, 179 N. Car. 133, 101 S. E. 497.

[19]Albers v. Acme Paving &c. Co., 196 Mo. App. 265, 194 S. W. 61.

[20]McCloskey v. Pacific Coast Co., 160 Fed. 794, 22 L. R. A. (N. S.) 673.

[21]Board of Education v. Edson, 18 Ohio St. 221, 98 Am. Dec. 114.

[22]Roberts v. Mathews, 137 Ala. 523, 34 So. 624, 97 Am. St. 56; Greene v. Boaz, 157 Ala. 68, 47 So. 255.

with the consent of all.[23] The several owners need not to make the dedication good concur in one act or act in the same way. Thus A sold to B a portion of his land, and thereafter in 1837 made a plat which included the part of the tract already sold. Subsequently in 1883 owners of B's tract conveyed by reference to this plat and by this act ratified and validated the dedication imperfectly made by A.[24] One who has contracted to sell lands may not thereafter dedicate a part thereof.[25] A mortgagor may dedicate land to the public use so as to divest himself of any rights in the property dedicated, but such dedication creates no more than an equity in the public to have the land opened subject to the mortgage,[26] and on the foreclosure of the mortgage the mortgagee has the right to revoke a dedication made by the mortgagor.[27] However, if the mortgagee makes no objection a third person can not on the grounds of the mortgage,[28] and when the owner of land after mortgaging it, makes a plan thereof, a release by the mortgagee of certain lots included in the plan by reference to the plan book is such a recognition of the plan by the mortgagee as shows his assent to the dedication of all the streets included in the plan.[29] An owner can not by laying off his land into lots and streets affect the lien of a judgment. As against a judgment such a plat can not operate as a dedication of the streets to public use,[30] but a judgment creditor

[23]Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260.

[24]Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260.

[25]Manitou v. International Trust Co., 30 Colo. 467, 70 Pac. 757.

[26]Manning v. House, 211 Ala. 570, 100 So. 772; Newport News &c. Elec. Co. v. Lake, 101 Va. 334, 43 S. E. 566; Kiernan v. Jersey City, 80 N. J. L. 273, 78 Atl. 228, 31 L. R. A. (N. S.) 1023.

[27]Manning v. House, 211 Ala. 570, 110 So. 772; Kiernan v. Jersey City, 80 N. J. L. 273, 78 Atl. 228, 31 L. R. A. (N. S.) 1023; Newport News &c. Elec. Co. v. Lake, 101 Va. 334, 43 S. E. 566.

[28]Roberts v. Columbia, G. &c. Tpk. Co., 98 Tenn. 133, 38 S. W. 587.

[29]Fereday v. Mankedick, 172 Pa. 535, 34 Atl. 46; Manning v. House, 211 Ala. 570, 100 So. 772, 31 L. R. A. (N. S.) 1023.

[30]Hays v. Perkins, 109 Mo. 102, 18 S. W. 1127. See also Shelton v. Franklin, 224 Mo. 342, 123 S. W. 1084, 135 Am. St. 537.

who does not object to an execution which recognizes a dedication subsequent to his judgment can not thereafter question the dedication.[31]

III. COMMON LAW DEDICATION.

[§ 362.] (A) Characteristics. — Dedications may be either common law or statutory. A common law dedication confers an easement only[32] and acts not as a grant but by "estoppel in pais,"[33] because of the lack of a grantee capable of taking. The dedication is regarded not as transferring a right, but as operating to preclude the owner from resuming his rights of private property or any use inconsistent with the public use.[34] The fee to the dedicated land remains in the dedicator,[35] and a common law dedication differs from a grant in that the legal title need not pass from its owner, nor is it necessary that any grantee of the use shall be in existence; all that is required is the assent of the owner of the land to the use and the actual enjoyment of the use for such a length of time that the public accommodation and private rights might be materially affected by an interruption of its enjoyment.[36] No particular length of time is essential to make a dedication valid and irrevocable. The dedication and acceptance may occur on a single day. All that is needed in any case is room for estoppel to work.[37] In this regard it differs from prescription,[38] and it is further distinguished from adverse possession in that the latter arises from acts of possession such as if seen by the party whose claim is sought to be divested would ap-

[31]Baker v. Chester Gas Co., 73 Pa. 116.

[32]Hoxie v. Gibson, 150 Ark. 432, 234 S. W. 490.

[33]Richards v. Public Service Comm., 293 Mo. 625, 239 S. W. 838.

[34]Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178; State v. Frank W. Coy Real Estate Co., 44 R. I. 357, 117 Atl. 432.

[35]Clark v. Huntington, 74 Ind. App. 437, 127 N. E. 301, 128 N. E. 453.

[36]Cincinnati v. White, 6 Pet. (31 U. S.) 431, 8 L. ed. 452.

[37]Flack v. Green Island, 127 N. Y. 107, 25 N. E. 265.

[38]Drimmel v. Kansas City, 180 Mo. App. 339, 168 S. W. 280.

prise him that the party doing the acts claimed ownership of the property,[39] whereas dedication originates in an act of the dedicator.[40]

For an act to constitute dedication it must confer some property right upon the public, either in the things itself or to some easement therein, which the grantor can not revoke. Otherwise it is a mere license, and the title remains in the licensor.[41] Thus the opening of a road from a highway to a mill for the use of the public in dealing with the owner of the mill constitutes license and not dedication. Implied invitation, actions upon the part of an owner which lead the public to believe land is set aside for public purposes, differs from dedication in that such acts may not represent his true intention as fully expressed by other actions and is therefore insufficient to dedicate it.[42] As the public is a necessary party to a dedication[43] there is no dominant tenement, and in this regard it differs from a private easement which can only be acquired by a grant or a prescription.[44] Thus there can be no common law dedication to a railroad company since such corporations are essentially private and assume the relation of common carrier merely for their own gain,[45] but such corporations may acquire property as a gift by the recording of a plat showing the land in question set aside for railroad purposes if the statutes of the jurisdiction give the recorded plat the effect of a conveyance.[46]

[§ 363.] (B) Acts Constituting Common Law Dedication.—The acts of dedication are expressed when manifested by explicit oral or written declaration of the owner

[39]Crosby v. Greenville, 183 Mich. 452, 150 N. W. 246.

[40]Hatch Bros. Co. v. Black, 25 Wyo. 416, 171 Pac. 267.

[41]Norton v. State, 11 Ala. App. 216, 65 So. 689.

[42]Birmingham v. Louisville &c. R. Co., 297 Fed. 816; Locklin v. Tucker, 208 Ala. 155, 93 So. 896.

[43]Western Union Tel. Co. v. Georgia R. &c. Co., 227 Fed. 276.

[44]Girard v. Lehigh Stone Co., 280 Ill. 479, 117 N. E. 698.

[45]Lake Erie &c. R. Co. v. Whithan, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. 355.

[46]Morgan v. Railroad Co., 96 U. S. 716, 24 L. ed. 743.

or those authorized to act in his behalf to persons with whom he deals and who rely upon them, or directly to the public or any other expressed act signifying his purpose to devote land to public use.[47] Thus a deed to the public or to trustees of the public can not take effect as a grant because of the absence of a legal grantee. It may, as evidence of an intention to donate land for a certain public use, such as a school, take effect as a common law dedication.[48] A letter authorizing the commissioners of the District of Columbia to widen a certain road upon which the writer's property abutted and promising to execute a deed for same, was a dedication;[49] but a mere agreement to dedicate on demand does not constitute dedication.[50] Where an owner petitioned a city to extend and construct a street through his property, and the city complied with his request, there was a dedication of the property for street purposes and an acceptance by the city, although the owner erased his name from the petition after passage of improvement order and also addressed a further communication to the city council remonstrating against the making of the improvement at a time of financial stringency, in which letter however, he did not withdraw his offer.[51]

The acts of dedication may be implied,[52] and the statutes against implied covenants do not apply against such dedications.[53] Thus where an owner sells or conveys land with reference to a plat made at his order or by another party, town or city, he thereby dedicates the streets or that portion of them abutting his property to the use of the pub-

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[47]Attorney General v. Onset Bay Grove Assn., 221 Mass. 342, 109 N. E. 165.

[48]Morris v. School Dist. No. 86, 63 Ark. 149, 37 So. 569.

[49]Lansburgh v. District of Columbia, 8 App. D. C. 10.

[50]Cincinnati v. McMakin, 8 Ohio Dec. 691.

[51]Terrell v. Hart, 28 Ky. L. 901, 90 S. W. 953.

[52]Schmidt v. Battle Creek, 188 Iowa 869, 175 N. W. 517.

[53]Baker City Mut. Irr. Co. v. Baker City, 58 Ore. 306, 110 Pac. 392, 113 Pac. 9.

lic,[54] unless it appears by express statement in the conveyance that such mention of the street is for the sole purpose of description and not as a dedication,[55] or if the deed expressly limits the use of highways, streets, etc., to the benefit of several owners abutting thereon, no dedication is made.[56] Likewise if the owner at the time of the conveyance was actively resisting the city's claim of dedication, a reference to street must be for descriptive purposes only,[57] and then the title remains in the grantor, subject to easements of grantees, for unless the intention is clearly shown no dedication exists.[58] A dedication may be effected independent of the deed by subsequent acts of the grantor provided these imply an intention to dedicate.[59] It is the estoppel resulting from an effective grant recognizing the highway that produces the inference of dedication, not the mere act of mapping, platting and selling.[60] Therefore the plat need not be made by owner, but merely recognized and approved by him,[61] nor need the plat be filed[62] or appear on the maps of the municipality.[63]

No particular formality is necessary to a common law dedication,[64] and the intention may be shown by laying out a road and allowing the public to use it,[65] by selling lands on the opposite sides of a street and permitting the public to use the same,[66] or by describing lots as bordering on a

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[54]Ramstad v. Carr, 31 N. Dak. 504, 154 N. W. 195, L. R. A. 1916B, 1160; Hope v. Shiver, 77 Ark. 177, 90 S. W. 1003.

[55]Wallace v. Cable, 87 Kans. 835, 127 Pac. 5, 42 L. R. A. (N. S.) 587.

[56]Baltimore v. White, 62 Md. 362.

[57]Glenn v. Baltimore, 67 Md. 390, 10 Atl. 70.

[58]Baltimore v. Yost, 121 Md. 366, 88 Atl. 342.

[59]Wheeler v. Oakland, 35 Cal. App. 671, 170 Pac. 864.

[60]State ex rel. Davis v. Meaher, 213 Ala. 466, 105 So. 562, 579.

[61]Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883.

[62]O'Donnell v. H. K. Porter Co., 238 Pa. 495, 86 Atl. 281.

[63]Garvey v. Harbison-Walker Refractories, 213 Pa. 177, 62 Atl. 778.

[64]Badeaux v. Ryerson, 213 Mich. 642, 182 N. W. 22.

[65]McGinnis v. St. Louis, 157 Mo. 191, 57 S. W. 755.

[66]Tweddell v. South Orange, 95 N. J. L. 327, 112 Atl. 511; Morse

designated street.[67] Moving a fence back and thus creating an alley,[68] and erecting a hedge along alleged way[69] have been held acts implying dedication. However it has also been held that the setting back of a fence is not in itself a decisive act showing intent to dedicate, especially when not accompanied by user,[70] and that the failure to fence,[71] or the tearing down of a fence,[72] are not sufficient to dedicate. The erection of a fence or gate across a road, thus barring the public, would deny a dedication,[73] and while a sign designating the land as a street of a certain name would imply a dedication, one marking it as a private way would deny it.[74] But when permission of the supervisors is sought prior to the erection of a gate, there is an unequivocal recognition of the dedication,[75] and where one in fencing in his lands places a gate on a way which is in common use and thereby invites the public to continue its use, he implies a dedication.[76] The maintenance of a building upon property alleged to be dedicated,[77] the enclosing of such land,[78] limiting use of benefits to adjacent owners,[79] and the objection to public use are all acts denying dedication.[80] The fact that the party denying the intention of dedication has paid taxes on the property in question is not controlling, but must be considered.[81] However, where the owner has paid

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v. Whitcomb, 54 Ore. 412, 102 Pac. 788; 103 Pac. 775, 135 Am. St. 832.

[67]St. Louis v. Clegg, 289 Mo. 321, 233 S. W. 1, 17 A. L. R. 1242.

[68]Tise v. Whitaker-Harvey Co., 146 N. Car. 374, 59 S. E. 1012.

[69]Kendall-Smith Co. v. Lancaster County, 84 Nebr. 654, 121 N. W. 960.

[70]Rozell v. Andrews, 103 N. Y. 150, 8 N. E. 513.

[71]Hansen v. Green, 275 Ill. 221, 113 N. E. 982.

[72]Hast v. Piedmont &c. R. Co., 52 W. Va. 396, 44 S. E. 155.

[73]Coburn v. San Mateo County, 75 Fed. 520.

[74]Union Co. v. Peckham, 16 R. I. 64, 12 Atl. 130.

[75]Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448.

[76]Hansen v. Green, 275 Ill. 221, 113 N. E. 982.

[77]Marion v. Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55; St. Louis v. Wetzel, 110 Mo. 260, 19 S. W. 534.

[78]Waggeman v. North Peoria, 155 Ill. 545, 40 N. E. 485.

[79]Thomas v. Vanderslice, 201 Ala. 73, 77 So. 367.

[80]Lawe v. Kaukauna, 70 Wis. 306, 35 N. W. 561.

[81]Kenwood Park v. Leonard, 177 Iowa 337, 158 N. W. 655.

taxes by acreage on the land as an entirety instead of by lots and blocks, this fact does not warrant a finding that there was no dedication.[82]

[§ 364.] (C) Intention to Dedicate a Necessary Element.—To constitute a dedication either expressed or implied there must be an intention, on the owner's part, to appropriate the property to some public use. A dedication being a voluntary donation is not presumed, but the clearest intention to the dedication must be shown by the party alleging it.[83] The intention must be unequivocably manifest,[84] but such purpose may be gathered from his open and visible conduct,[85] and if such acts are contrary to his true purpose, he is precluded from resuming his right of private property, for such would operate a fraud upon the public.[86] Furthermore if there exists an actual intention to reserve any portion of lands platted into streets otherwise than by express reservation on the plat, it should be made manifest in some manner not only of equal certainty but also of equal publicity as the plat. Otherwise the actual intention can not prevail against the intent as shown by unequivocal acts upon which the public must rely.[87] An intention not evidenced by acts signifies nothing.[88]

It is not necessary to designate space as a street or alley to effect dedication.[89] It is sufficient if upon consideration of the entire plat there is a manifest intent to dedicate.[90] Nevertheless if all that appears upon the face of a plat is a blank space, and there is nothing to indicate that the land

[82]Beale v. Takoma Park, 130 Md. 297, 100 Atl. 379; Nelson v. Madison, 17 Fed. Cas. No. 10,110.

[83]Hooker v. Morris, 92 Okla. 194, 218 Pac. 869.

[84]Grady v. Greenville, 129 S. Car. 89, 123 S. E. 494.

[85]Richards v. Public Service Comm., 293 Mo. 625, 239 S. W. 838.

[86]Main v. Nash, 212 Mo. App, 689, 245 S. W. 581.

[87]Hanson v. Proffer, 23 Idaho 705, 132 Pac. 573.

[88]Flack v. Green Island, 122 N. Y. 107, 25 N. E. 267.

[89]State ex rel. Davis v. Meaher, 213 Ala. 466, 105 So. 562.

[90]Oregon City v. Oregon &c. R. Co., 44 Ore. 165, 74 Pac. 924.

covered by it has been devoted to public use, it can not be held from the face of the plat alone that the owner intended to dedicate.[91] Where a plat shows land divided off into blocks and streets, and certain streets are marked reserved on the plat, there is no dedication of these streets.[92]

It has been held that where the space representing the land between a street paralleling a body of water and the water was left blank, there was no dedication; that where a strip was marked "beach" the public acquired no rights by dedication,[93] and that the abutting owners merely acquired easements,[94] but it has also been held that it is inconceivable that an owner intended to lay out a town on the banks of a navigable water and parallel the bank with a street and at the same time cut the public off from the water,—"that this is contrary to reason and to the obvious intention in selecting the town site,"[95] and that the line between such a street and the unassigned land bordering the water merely designated the uses to which the parts might be put.[96] Wherever this situation arises it is advisable to indicate definitely the owner's intention regarding the strip between the street and shore or bank upon the plat so that nothing is left for future construction.

The rules applying to streets and highways apply equally well to squares and parks, or groves, which has been construed as another name for a certain kind of park.[97] Where the plat shows a park, but the dedication instrument mentions only the streets, sale by reference to the plat operated as a dedication of the parcel for public park purposes.[98]

The rules applying to streets and parks are not applica-

[91]Coe College v. Cedar Rapids, 120 Iowa 541, 95 N. W. 267.

[92]Rosenson v. Bochenek (N. J.), 141 Atl. 753.

[93]Poole v. Reheboth, 9 Del. Ch. 192, 80 Atl. 683.

[94]Deffenbaugh v. Washington Water Power Co., 24 Idaho 514, 135 Pac. 247.

[95]Davies v. Epstein, 77 Ark. 221, 92 S. W. 19.

[96]Uniontown v. Berry, 24 Ky. L. 1692, 72 S. W. 295.

[97]Morrow v. Highland Grove Traction Co., 219 Pa. 619, 69 Atl. 41, 123 Am. St. 677.

[98]Florida East Coast R. Co. v. Worley, 49 Fla. 297, 38 So. 618.

ble to wharves, for whereas the very terms "streets" and "parks" suggest public use, the word "wharf" applies equally to public or privately owned structures, and hence the name itself does not imply dedication.[99] Furthermore the intention as to the extent of the dedication should be clear. To constitute a valid dedication a definite and certain description of what is dedicated is essential. An instrument of conveyance ought upon its face to show at least enough to enable a competent surveyor to find with absolute certainty that which is assumed to be conveyed, and the same applies to documents and maps relied upon to effect a dedication. In Sanders v. Riverside[1] a map drawn to a scale of one inch to four hundred feet showed thirty (30) feet in width set aside for railroad and parking space for trees to screen trains. The latter was indicated by green which appeared by scale to cover half of the space. It was not marked on the ground, and the railroad utilized more than half. It was held that under these circumstances there was no dedication of the parking strip for want of certainty. If trees or grass had been planted to indicate the width, the dedication would have been satisfactory. It is not essential that description of land dedicated be so precise that location and identity of land embraced be apparent from the description alone, but extraneous circumstances may be considered to show the application of the description.[2]

IV. STATUTORY DEDICATION.

[§ 365.] (A) General.—In many states statutes provide the procedure for the dedication of land to the public. These differ both in details and in their effect as will be noted, but usually provide that where an owner has had his land surveyed, platted, and has acknowledged and recorded

[99]Palen v. Ocean City, 64 N. J. L. 669, 46 Atl. 774.

[1]118 Fed. 720.

[2]Paragould v. Lawson, 88 Ark. 478, 115 S. W. 379.

the plot, then such portions designated for streets, parks, school lots, etc., shall be as fully beyond his control as if he had deeded them to a legal person for the uses mentioned.[3] Statutory dedications are made by surveying and platting the land and acknowledging and placing on record a plat. These statutes are not intended to restrict the common law method,[4] nor do they abrogate the well settled rule of implied dedication by estoppel in pais[5] but provide only a new means. The statutes are not retroactive and do not apply to plats acknowledged and recorded prior to their enactment,[6] nor do they enlarge, restrict, or modify the purpose for which an owner may dedicate land.[7]

Platting involves so many technical details that the administration of statutory dedication is left largely to the engineer of the city or the regional planning commission. The approval of these officers is invariably required before a plat can be recorded, but the statutes contemplate in this connection that such approval shall merely signify that the requirements in regard to precision, monumenting, grades and coordination of street plan have been satisfied. The regularity of the legal details should be checked by the recorder, but where there is division of responsibility there are apt to be errors of omission. For this reason the engineer should take the responsibility of seeing that the plat is clear as to the disposition of all the land within its borders, and as to the purpose for which all dedicated lands are given.

[§ 366.] (B) Nature of Statutory Dedications. — Statutory dedications which conform to the statutes are in the nature of a grant,[8] and in most jurisdictions differ from

[3]Board of Education v. Edson, 18 Ohio St. 221, 98 Am. Dec. 114.

[4]Hardin v. Ferguson, 271 Mo. 410, 196 S. W. 746.

[5]Cole v. Minnesota Loan &c. Co., 17 N. Dak. 409, 117 N. W. 354.

[6]Shaw v. Johnson, 17 Idaho 676, 107 Pac. 399.

[7]Lake Erie &c. R. Co. v. Whitham, 155 Ill. 514, 40 N. E. 1014.

[8]Ramstad v. Carr, 31 N. Dak.

common law dedications in that they vest legal title to the grounds set apart for public purposes in the municipal corporation[9] while the latter leave the legal title in the original owner although in some states, like a common law dedication, they confer merely an easement and the fee remains in the dedicator.[10]

A plat as a mode of conveyance was unknown to the common law, and can have such effect only by virtue of statute. Therefore a plat will not convey the fee of the streets therein unless made out, certified, acknowledged and recorded in strict conformity with the statutes, but will operate as a common law dedication.[11] The mere recording of a defective plat does not constitute a common law dedication[12] but rather other acts expressing or implying intention, which in themselves constitute common law dedication,[13] such as conveying with reference to the plat render the defective plat operative as such. The rule that a defective statutory dedication acts as a common law dedication has been applied where the plat was not signed,[14] acknowledged,[15] sealed,[16]

504, 154 N. W. 195, L. R. A. 1916B, 1160.

[9]Denver &c. R. Co. v. Hannegan, 43 Colo. 122, 95 Pac. 343, 16 L. R. A. (N. S.) 847, 127 Am. St. 100; Shaw v. Johnson, 17 Idaho 676, 107 Pac. 399; Ryerson v. Chicago, 247 Ill. 185, 93 N. E. 162; Lacy v. Oskaloosa, 143 Iowa 704, 121 N. W. 542, 31 L. R. A. (N. S.) 853.

In incorporated municipalities only see note 11; Douglas County v. St. Lawrence, 102 Kans. 656, 171 Pac. 610; Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600; Laddonia v. Day, 265 Mo. 383, 178 S. W. 741; Callen v. Columbus Edison Elec. Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; San Antonio v. Rowley, 48 Tex. Civ. App. 376, 106 S. W. 753.

[10]Murray v. Huntingburg, 187 Ind. 504, 119 N. E. 209; Kenwood Park v. Leonard, 177 Iowa 337, 158 N. W. 655 (in unincorporated territory); Betcher v. Chicago, M. &c. R. Co., 110 Minn. 228, 124 N. W. 1096; Hamilton County v. Rape, 101 Tenn. 222, 47 S. W. 416; Bradley v. Spokane &c. R. Co., 79 Wash. 455, 140 Pac. 688.

[11]Ryerson v. Chicago, 247 Ill. 185, 93 N. E. 162.

[12]State ex rel. Davis v. Meaher, 213 Ala. 466, 105 So. 562.

[13]Ruddiman v. Taylor, 95 Mich. 547, 55 N. W. 376.

[14]Ruddiman v. Taylor, 95 Mich. 547, 55 N. W. 376; Pillsbury v. Alexander, 40 Nebr. 242, 58 N. W. 859.

[15]Owen v. Brockport, 208 Ill. 35, 69 N. E. 952.

[16]Albers v. Acme Paving &c. Co., 196 Mo. App. 265, 194 S. W. 61.

recorded,[17] did not comprise city or town or addition thereto,[18] and was not made by county surveyor as required by statute,[19] nor acknowledged or recorded until after passing from owner but recognized thereafter.[20]

[§ 367.] (C) **Requisites of Statutory Dedication.**—In order to constitute a statutory dedication there must be a substantial compliance with the statute.[21] A statutory dedication must be signed by the dedicator if so required by statute, and it is uniformly required that they be acknowledged.[22] The formalities prescribed by the statutes are essential,[23] and if statute requires acknowledgment before a designated officer, acknowledgment before any other officer will not do,[24] but if no particular officer is named, any officer competent to take an acknowledgment will do,[25] but acknowledgment before an officer who is not competent will not suffice.[26] If statute provides for acknowledgment without defining kind, acknowledgment need not be such as is required in deed.[27] If acknowledgment by owner is required, acknowledgment by agent will not suffice,[28] and it has been held under a statute of this character that an acknowledgment by an attorney in fact will not suffice,[29] but the proprietor may by a duly executed power of attorney authorize an agent to acknowledge and record a plat. This has been held effective where the execution, deliver-

[17]Kuck v. Wakefield, 58 Ore. 49, 115 Pac. 428.

[18]Woodruff Place v. Rachig, 147 Ind. 517, 46 N. E. 990.

[19]Nelson v. Randolf, 222 Ill. 531, 78 N. E. 914.

[20]McMahon v. Borland, 262 Ill. 358, 104 N. E. 701.

[21]Stack v. Tennessee Land Co., 209 Ala. 449, 96 So. 355.

[22]Lais v. Silverston, 82 Ore. 503, 162 Pac. 251; Stack v. Tennessee Land Co., 209 Ala. 449, 96 So. 355; Manning v. House, 211 Ala. 570, 100 So. 772.

[23]Nelson v. Madison, 17 Fed. Cas. No. 10,110.

[24]Gould v. Howe, 131 Ill. 490, 23 N. E. 602.

[25]State v. Schwin, 65 Wis. 207, 26 N. W. 568.

[26]Farwell v. Chicago, 247 Ill. 235, 93 N. E. 168.

[27]State v. Schwin, 65 Wis. 207, 26 N. W. 568.

[28]Russell v. Lincoln, 200 Ill. 511, 65 N. E. 1088.

[29]Earll v. Chicago, 136 Ill. 277, 26 N. E. 370.

ance and recordation of the power of attorney was subsequent to the filing of the plat on the theory that what could be authorized beforehand, could be afterwards ratified.[30] If there are several owners a dedication is defective if not acknowledged by all,[31] but if the owner who has not acknowledged the plat executes a deed in which the parcel conveyed is described by reference to the plat, there being nothing to show a purpose to disavow it, such recognition will make it binding upon him.[32] The plat must be recorded as provided by statute[33] and recording in the wrong place is fatal.[34] The failure of the recording officer to record a duly filed plat until after death of the dedicator does not necessarily invalidate a dedication.[35] Although in general no subsequent act on the part of either party can cure a defective statutory dedication,[36] curative statutes relative to the acknowledgment have been held to give full validity and efficacy to a statutory dedication deficient because of defective acknowledgment,[37] and a subsequent deed properly executed fully dedicating streets to public use, and in which the dimensions of the adjacent lots were given, cured a statutory dedication by plat defective because of the lack of such dimensions.[38]

V. ACCEPTANCE.

[§ 368.] **(A) General.**—Dedication partakes of the nature of a grant and a gift [39] and hence like a contract con-

[30]Bright v. Superior, 163 Wis. 1, 156 N. W. 600.

[31]Alton v. Fishback, 181 Ill. 396, 55 N. E. 150.

[32]Wallace v. Cable, 87 Kans. 835, 127 Pac. 5, 42 L. R. A. (N. S.) 249.

[33]Nelson v. Madison, 17 Fed. Cas. No. 10,110.

[34]Nelson v. Madison, 17 Fed. Cas. No. 10110.

[35]Scott v. Des Moines, 64 Iowa 438, 20 N. W. 752.

[36]Leadville v. Coronado Min. Co., 37 Colo. 234, 86 Pac. 1034; Hayes v. Kansas City, 294 Mo. 655, 242 S. W. 411.

[37]Miami County v. Wilgus, 42 Kans. 457, 22 Pac. 615.

[38]Meachem v. Seattle, 45 Wash. 380, 88 Pac. 628.

[39]Inyo County v. Given, 183 Cal. 415, 191 Pac. 688.

sists of an offer and acceptance,[40] and subject to certain exceptions it is a well settled rule that a dedication is not binding and conclusive on either party until acceptance,[41] proof of which must be unequivocal.[42]

[§ 369.] (B) **Necessary Elements.**—Acceptance may be actual or constructive, expressed or implied, and in absence of statutes to the contrary no formality is necessary,[43] and even where the statutes provide for formal acceptance it will not be necessary unless the statutes also declare that this kind of acceptance shall be exclusive.[44] Until acceptance the public acquires no rights and assumes no responsibilities,[45] and owners cannot for their own convenience force streets and the maintenance of the same upon a city.[46]

Acceptance must be within a reasonable time,[47] by which in general is meant that they may defer acceptance until required by public necessity,[48] but a dedication can not be completed after a long lapse of years, especially when the dedication has been denied by the erection of substantial buildings and the occupancy of the premises as private property.[49] While long delays do not debar a city's acceptance,[50] what constitutes a reasonable time must be determined by the facts and circumstances of each case,[51] and

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[40]Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.

[41]Pitcairn v. Chester, 135 Fed. 587; Benld v. Dorsey, 311 Ill. 192, 142 N. E. 563.

[42]Princeton v. Gustavson, 241 Ill. 566, 89 N. E. 653.

[43]Stockwell v. Dunckel, 174 App. Div. 481, 159 N. Y. S. 32.

[44]In re Hunter, 164 N. Y. 365, 58 N. E. 288.

[45]Georgia R. &c. Co. v. Atlanta, 118 Ga. 486, 45 S. E. 256.

[46]Olinger v. Watson, 160 App. Div. 96, 145 N. Y. S. 173.

[47]Elliot v. McIntosh, 41 Cal. App. 763, 183 Pac. 692; Fortner v. Eldorado Springs Resort Co., 76 Colo. 106, 230 Pac. 386.

[48]Dewey v. Chicago, 274 Ill. 268, 113 N. E. 599.

[49]Kelley v. Jones, 110 Maine 360, 86 Atl. 252; Christopherson v. Forest City, 178 Iowa 893, 160 N. W. 691.

[50]Tweddell v. South Orange, 95 N. J. L. 327, 112 Atl. 511.

[51]Harris v. South Portland, 118 Maine 356, 108 Atl. 326.

it is not necessary that all the property be accepted at one time if the immediate public convenience does not require it.[52] Acceptance must be before revocation, and in this regard the death of the owner constitutes revocation.[53]

[§ 370.] **(C) By General Public.**—Acceptance by the public or by user can be proved only indirectly, but nevertheless the public can make an acceptance which will bind the dedicator without the formal action of city, county, or other public authorities.[54] The general public may accept by user, and as master need not wait for the formal act of its servants and agents. A municipal corporation consists of the inhabitants and not the officers who are agents of the corporation. The inhabitants as principals may by their conduct accept dedication, and it is of no great importance that their agents have not acted.[55] The contrary has been held where it was argued that the general public could not accept because it would thus acquire rights without liabilities.[56]

[§ 371.] **(D) By Municipality.—(1) Effect of Responsibilities.**—Acceptance by a municipality involves liabilities, the care and maintenance as well as the privileges of use, and hence there is some conflict as to the requisites necessary to bind the public authorities for care and maintenance. "Important consequences flow from the acceptance of a highway by the public authorities, and the rule is a salutary one which requires the mere use by individuals shall not render the corporate body liable for such

[52]Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; Kimball v. Chicago, 253 Ill. 105, 97 N. E. 257.

[53]People v. Kellogg, 67 Hun 546, 22 N. Y. S. 490, 10 N. Y. Cr. 324, 51 N. Y. St. 99. See § 381, infra.

[54]Bowersox v. Johnson County, 183 Iowa 645, 167 N. W. 582. To the contrary, Rose v. Elizabethtown, 275 Ill. 167, 114 N. E. 14.

[55]Watertown v. Troeh, 25 S. Dak. 21, 125 N. W. 501. See Riley v. Buchanan, 116 Ky. 625, 76 S. W. 527, 529, 63 L. R. A. 642.

[56]See § 371, supra; Houston v. Finnigan (Tex. Civ. App.), 85 S. W. 470; Smith v. King County, 80 Wash. 273, 141 Pac. 695.

consequences."[57] "A town or other municipal corporation can not have forced upon it as highways whatever ways and paths individuals may open and lay out with a view to the enhancement of their private property or for other reasons,"[58] and this is obvious where statutes require acceptance.[59] This reasoning conclusively establishes that formal acceptance of some kind is necessary for a municipality to incur liabilities for the care and maintenance of a street and for injuries occasioned by defects.[60]

On the other hand "it appears to be unreasonable and contrary to the plainest principles of justice, that acceptance may be thus proved (by public user) and inferred against the landowner or those who are charged with the violation of the law by obstructing a public way, and yet that the same evidence will be insufficient to prove the like fact when the public authorities are charged with neglect of duty or violation of the law touching the highway whereby the private citizen suffers loss. This would be establishing one kind of law for the citizen and another for the municipality and other quasi corporations and public officers; and the recognition of different rules of evidence in cases where the same facts and same issues are presented

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[57]Chapman v. Sault Ste. Marie, 146 Mich. 43, 109 N. W. 53.

[58]Bacon v. Boston &c. R. Co., 83 Vt. 421, 76 Atl. 128. See also Harlan v. Parsons, 202 Ky. 358, 259 S. W. 717.

[59]Schuster v. Barber Asphalt Pav. Co., 24 Ky. L. 2346, 74 S. W. 226.

[60]Partridge v. Richmond, 36 Cal. App. 389, 172 Pac. 166; Seaboard Air-Line R. Co. v. Greenfield, 160 Ga. 407, 128 S. E. 430; Mulligan v. McGregor, 165 Ky. 222, 176 S. W. 1129; Harris v. South Portland, 118 Maine 356, 108 Atl. 326; Baltimore v. Broumel, 86 Md. 153, 37 Atl. 648; In re Munroe's Petition, 245 Mass. 474, 139 N. E. 828; Chapman v. Sault Ste. Marie, 146 Mich. 23, 109 N. W. 53; Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170; State v. Atherton, 16 N. H. 203; Shearer v. Reno, 36 Nev. 443, 136 Pac. 705 (qualified); United N. J. R. &c. Co. v. Crucible Steel Co., 85 N. J. Eq. 7, 95 Atl. 243; Powlowski v. Mohawk Golf Club, 204 App. Div. 200, 198 N. Y. S. 30; Houston v. Finnigan (Tex. Civ. App.), 85 S. W. 470; Hatch Bros. Co. v. Black, 25 Wyo. 416, 171 Pac. 267; Commonwealth v. Keily, 8 Grat. (Va.) 632; Hast v. Piedmont &c. R. Co., 52 W. Va. 396, 44 S. E. 155.

for the determination of the same or like rights, duties and legal liabilities."[61] According to this logic, municipal responsibility is incurred by user and no formal acceptance is necessary.[62]

Neither of these principles considers the most important element in the problem. Acceptance or nonacceptance depends primarily upon the affirmative acts of the municipal authorities. It is conceded that the acts of the various city officials in the pursuance of their duties do not commit a municipality in the matter of acceptance. Thus where the water department upon the petition of the residents along a cul de sac extend a main so that the houses may have city water, there is clearly no acceptance.[62a] On the other hand, where the authorities authorize the extension of water and sewer services into new subdivisions the plans of which they have controlled and regulated through their engineering office, issue bonds to pay for the same, and assess the cost against the abutting properties, there is an implied acceptance of great strength. The authorities have, by the extension of the public credit, become, as it were a partner in the enterprise, and the services which they have provided constitute a strong inducement to purchasers of homes. When such a community is settled there is no hesitancy upon the part of the authorities to reap dividends in the form of high taxes, but when the matter of acceptance is raised, they shirk responsibility upon the theory that the public can not be saddled with streets laid out by developers with private profits in view.

This situation is not imaginative, but is real in at least

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[61]Manderschild v. Dubuque, 29 Iowa 73, 4 Am. Rep. 196.

[62]Green v. Canaan, 29 Conn. 157; Hammond v. Maher, 30 Ind. App. 286, 65 N. E. 1055; Manderschild v. Dubuque, 29 Iowa 73, 4 Am. Rep. 196 (divided court); Phelps v. Mankato, 23 Minn. 276; Ackerman v. Williamsport, 227 Pa. 591, 76 Atl. 421; Caston v. Rock Hill, 107 S. Car. 124, 92 S. E. 191.

[62a]People v. Underhill, 144 N. Y. 316, 39 N. E. 333, revg. 69 Hun 86, 23 N. Y. S. 388, 52 N. Y. St. 731.

one community, and exists in this particular instance because of inadequacy of the authorities which have obligated the public to acceptance. Modern machinery in the form of a sanitary and a park planning commission grafted on to a system of county government designed for conditions prior to the Civil War has resulted in a mechanism that does not function, and the matter of street acceptance is but one of the many gears that squeak.

The modern trend in regard to the financing of street improvements has lessened the "important consequences" that "flow from the acceptance of a highway." In the more progressive communities paving costs, except along trunk highways, are borne by the abutting property owners. Under these circumstances the benefits sought by residents asking for acceptance are (1) organization of the paving project and supervision of the construction, (2) the extension of credit to finance the improvement, and (3) maintenance service. The owners contemplate no raid upon the local treasury, and expect to pay for the improvements by special assessment and for the maintenance by taxes. All that acceptance implies is that the local government operate to render the services that justify its existence.

Regional planning and regional government should develop simultaneously. For these reasons the best law does not require absolute compliance to statutory methods of acceptance where such are specified, but recognizes that acceptance sufficient to incur liabilities may be implied from the affirmative acts of the proper authorities.[63]

[§ 372.] (2) **Capacity of Accepting Body.**—Acceptance may be accomplished by affirmative action of the public authorities empowered by statute to accept a dedication, and as acceptance imposes duties and burdens, it is essential that it be made by the proper authorities.[64] Mu-

[63]See § 373, infra.

[64]Birmingham v. Graham, 202 Ala. 202, 79 So. 574; Ellis v. Hazelhurst, 138 Ga. 181, 75 S. E. 99.

nicipal councils and other bodies charged with the opening, maintaining, and repairing of streets may accept,[65] but in general tax assessors,[66] street commissioners,[67] surveyors,[68] overseer of highways,[69] police department, tax department, highway bureau,[70] various officials connected with construction of gas mains, sewers, street lights, sign posts, etc.,[71] can not accept, and where the power to accept is conferred by statute upon a designated officer or board no other can accept.[72]

[§ 373.] (E) Acts Constituting Acceptance. — (1) General.—Unless provided by statute no particular form is necessary,[73] and it has been held that merely notifying that the land dedicated will be opened for a street will suffice.[74] Opening up and improving,[75] or attempting to do so,[76] repairing,[77] ordering repairs,[78] or promise to repair,[79] appropriating money for repairs,[80] issuing bonds to pay for construction,[81] working,[82] patrolling,[83] substituting dedi-

[65]Seattle v. Hill, 23 Wash. 92, 62 Pac. 446.

[66]Boatmen's Bank v. Semple Place Realty Co., 202 Mo. App. 57, 213 S. W. 900; Ramstad v. Carr, 31 N. Dak. 504, 154 N. W. 195, L. R. A. 1916B, 1160.

[67]Grant v. Dickson City Borough, 235 Pa. 536, 84 Atl. 454.

[68]State v. Bradbury, 40 Maine 154.

[69]Jordan v. Otis, 37 Barb. (N. Y.) 50.

[70]In re Starr Street, 73 Misc. 380, 131 N. Y. S. 71. See also Louisville v. Snow, 107 Ky. 536, 54 S. W. 860.

[71]In re Wallace Ave., 222 N. Y. 139, 118 N. E. 506.

[72]State v. Bradbury, 40 Maine 154.

[73]San Antonio v. San Antonio Academy (Tex. Civ. App.), 259 S. W. 995.

[74]Parriott v. Hampton, 134 Iowa 157, 111 N. W. 440.

[75]Winthrop Harbor v. Gurdes, 257 Ill. 596, 101 N. E. 199.

[76]Russell v. Lincoln, 200 Ill. 511, 65 N. E. 1088.

[77]Ramstad v. Carr, 31 N. Dak. 504, 154 N. W. 195, L. R. A. 1916B, 1160.

[78]Kennedy v. Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

[79]Curran v. St. Joseph, 264 Mo. 656, 175 S. W. 584.

[80]Philadelphia Museums v. Pennsylvania University, 251 Pa. 115, 96 Atl. 123.

[81]Lowery v. Pekin, 210 Ill. 575, 71 N. E. 626.

[82]Corsicana v. Anderson, 33 Tex. Civ. App., 596, 78 S. W. 261.

[83]Louisville v. Snow, 107 Ky. 536, 54 S. W. 860. See also In re Starr Street, 73 Misc. 380, 131 N. Y. S. 71.

cated street for an ancient way,[84] authorizing railroad to use streets,[85] ordinance authorizing and directing the laying of sewer and water mains,[86] have all been held as acts of acceptance. The placing of a street in question on an official map prepared under direction and authority of municipal authorities is an acceptance,[87] and the exclusion of land by the map is an admission that such is not a street.[88] Acceptance is clearly indicated when a request to assess is refused,[89] especially when taken in connection with other acts such as laying of gas mains, sidewalks and grading.[90] However as tax officers are not empowered to accept,[91] the description of lands assessed as being on an alleged street which has been dedicated is not an acceptance of such a street,[92] and the mere omission to assess land within the street does not constitute acceptance.[93] The failure to assess may be of no significance and where an owner, paying taxes on lands dedicated for a street gives no notice to the municipality, the latter is not estopped from asserting its right to open the same.[94] The approval of a plat is not an acceptance of the streets thereon,[95] and the fact that a statutory plat covers land within corporate limits does not imply acceptance by the municipality,[96] nor does the mere fact that a city extends its limits so as to include platted land or when incorporated includes such within its borders,

[84]State v. Atherton, 16 N. H. 203.

[85]McKee v. Pennsylvania R. Co., 255 Pa. 560, 100 Atl. 454.

[86]In re Hunter, 163 N. Y. 542, 57 N. E. 735, 79 Am. St. 616, 164 N. Y. 365, 58 N. E. 288; Burroughs v. Cherokee, 134 Iowa 429, 109 N. W. 876.

[87]Schade v. Albany, 16 N. Y. S. 262; Smith v. Buffalo, 90 Hun 118, 35 N. Y. S. 635, 70 N. Y. St. 400.

[88]Lownsdale v. Portland, 15 Fed. Cas. No. 8,578.

[89]New Orleans v. Carrollton Land Co., 131 La. 1092, 60 So. 695.

[90]In re Bragaw St., 141 N. Y. S. 987.

[91]Johnson v. Niagara Falls, 230 N. Y. 77, 129 N. E. 213.

[92]Lynbrook Homes, Inc. v. Frey, 217 App. Div. 164, 216 N. Y. S. 351.

[93]Arnold v. Orange, 73 N. J. Eq. 280, 66 Atl. 1052.

[94]Chafee v. Aiken, 57 S. Car. 507, 35 S. E. 800.

[95]People ex rel. v. Massieon, 279 Ill. 312, 116 N. E. 639.

[96]Reichert Milling Co. v. Freeburg, 217 Ill. 384, 75 N. E. 544.

imply acceptance.[97] However the contrary has been held, particularly when some of the streets were opened, used, or improved in which event all were considered accepted.[98] The cleaning of an alley for sanitary purposes only,[99] the maintenance of a light in a recognized street at the intersection of an alleged way,[1] and the maintenance of a light erected by a private corporation do not constitute acceptance,[2] nor the granting of permission by a duly authorized municipal officer for the laying of gas mains or a private sewer.[3]

[§ 374.] (2) **Statutory Regulations.**—Where statutes provide a specific method, an acceptance in compliance is sufficient,[4] and it has often been held no other method is valid,[5] but there is authority holding that the statutes are for protection of municipalities against liabilities,[6] that the benefits conferred may be waived,[7] and that acceptance may be accomplished by other acts than those provided by statute such as authorized improvements, provided such acts would be sufficient to constitute an acceptance at common law.[8] Where statutory procedure of acceptance is attempted, but not followed through the acceptance is ineffective.[9] In some jurisdictions no acceptance is necessary to complete a statutory dedication,[10] and in these jurisdictions no equity can arise in favor of an individual who takes private possession. His occupancy is subject to the right of

[97]Russell v. Chicago &c. Elec. R. Co., 205 Ill. 155, 68 N. E. 727.

[98]Newton v. Dallas (Tex. Civ. App.), 201 S. W. 703.

[99]De Grilleau v. Frawley, 48 La. Ann., 184, 19 So. 151.

[1]Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.

[2]Arnold v. Orange, 73 N. J. Eq. 280, 66 Atl. 1052.

[3]In re Wallace Ave., 222 N. Y. 139, 118 N. E. 506.

[4]Backman v. Oskaloosa, 130 Iowa 600, 104 N. W. 347.

[5]In re Wallace Ave. 179 App. Div. 172, 166 N. Y. S. 429.

[6]Leadville v. Coronado Min. Co., 29 Colo. 17, 67 Pac. 289.

[7]Hunter v. Des Moines, 144 Iowa 541, 123 N. W. 215.

[8]Louden v. Starr, 171 Iowa 528, 154 N. W. 331.

[9]Gregory v. Ann Arbor, 127 Mich. 454, 86 N. W. 1013.

[10]Interstate Iron &c. Co. v. East Chicago, 187 Ind. 506, 118 N. E. 958.

the public, and such right may be asserted at any time at convenience of the public.[11] In others to protect the public from having a gift thrust upon them a statutory dedication must be accepted the same as a common law. In these a deed to an individual calling for public use of a way binds the dedicator,[12] but implies no responsibility on the public in absence of acceptance.[13]

[§ 375.] (F) **Extent.**—The extent of a dedication depends upon the intention of the dedicator as manifested in the act of dedication, and the right of the public is limited to the physical property so set aside for public use.[14] Although some decisions limit acceptance to the way actually opened and used,[15] it is generally held that where a municipality opens and maintains part of the width shown in a plat, acceptance applies to all and is not limited by fences built by abutters on line of actual use,[16] and this is so although subsequent to sale owner changed his mind and attempted to supersede map used when making sales by a recorded plat differing therewith as to width of streets.[17]

When there is nothing in a plat to indicate the width, character, and extent, use for the prescriptive period establishes the same,[18] and when dedication is followed by acceptance by user the location as delineated by stakes set in act of dedication prevails,[19] regardless of fact that the public confined use for travel to a narrow portion.[20] However if

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[11]Gadarl v. Humboldt, 87 Kans. 41, 123 Pac. 764.

[12]Drimmel v. Kansas City, 180 Mo. App. 339, 168 S. W. 280. See § 234, supra.

[13]Harrington v. Manchester, 76 N. H. 347, 82 Atl. 716.

[14]Schmidt v. Battle Creek, 188 Iowa 869, 175 N. W. 517.

[15]Commonwealth v. Royce, 152 Pa. 88, 25 Atl. 162.

[16]In re Widening of State Road, 236 Pa. 141, 84 Atl. 686; Hill v. Oxnard, 46 Cal. App. 624, 189 Pac. 825.

[17]Nicholas v. Title &c. Co., 79 Ore. 226, 154 Pac. 391.

[18]Western Railway of Alabama v. Alabama Grand Trunk R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474.

[19]Middletown v. Glenn, 278 Ill. 149, 115 N. E. 847.

[20]Brunner Fire Co. v. Payne, 54 Tex. Civ. App. 501, 118 S. W. 602.

private individuals are permitted to use a portion contrary to the public, this does not necessarily hold.[21] A highway obtained by prescription need not be 66 feet as prescribed by statute, but its width is limited to that actually used.[22] Likewise acceptance of part of length may imply acceptance of entire length.[23] When the description of a deed conveys property as bounding on a street without reference to a map and without other ascertainment of length, the dedication is no farther than beyond frontage then actually opened at the time of the delivery of the deed;[24] and the conveyance of lots bounded by an unopened street over grantor's land on a public or private plat, operates as a dedication of only as much land occupied by the street in either direction as will enable grantor to reach some open or unopened highway.[25]

A way dedicated as running to a navigable stream extends to the water[26] even though it is used and worked no farther than the bank.[27] If by act of dedicator[28] or by accretions[29] the length or width of the streets is increased by filling[30] the easement covers the fill, and the street extends to the water. However if the land is made by legislative authority and is sold by the state, the street terminates at the original high water.[31]

The acceptance of some streets in a plat does not necessarily imply the acceptance of all,[32] for the public may re-

[21]Bell v. Burlington, 68 Iowa 296, 27 N. W. 245. See § 347, supra.

[22]Donovan v. Union Pac. R. Co., 103 Nebr. 663, 173 N. W. 583, 104 Nebr. 364, 177 N. W. 159.

[23]Crosby v. Greenville, 183 Mich. 452, 150 N. W. 246.

[24]Camden v. McAndrews & Forbes Co., 85 N. J. L. 260, 88 Atl. 1034.

[25]Baltimore v. Frick, 82 Md. 77, 33 Atl. 435.

[26]McCloskey v. Pacific Coast Co., 160 Fed. 794, 22 L. R. A. (N. S.) 673. See § 364.

[27]Cake v. Sunbury, 43 Pa. Sup. Ct. 95.

[28]McAndrews & Forbes Co. v. Camden, 78 N. J. Eq. 244, 78 Atl. 232.

[29]Banks v. Ogden, 2 Wall. (69 U. S.) 57, 17 L. ed. 818.

[30]Jersey City v. Morris Canal &c. Co., 12 N. J. Eq. 547.

[31]Hoboken v. Pennsylvania R. Co., 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. 643.

[32]Reichert Milling Co. v. Freeburg, 217 Ill. 384, 75 N. E. 544.

ject some and accept others,[33] but unless the intention to limit is expressed, an acceptance of some streets will presume an acceptance of all,[34] and that the remaining streets will be opened up as occasion requires.[35] Nevertheless the presumption is not conclusive[36] and if it is shown that there was an intention to limit the acceptance to a part, it will not include the whole.[37]

VI. LIMITATIONS.

[§ 376.]—A dedicator may specify the uses and purposes to which the land dedicated may be applied and impose conditions and limitations[38] and may make the dedication subject to private easements not antagonistic to public use, such as access, light, air, etc.[39] He may restrict a way to certain uses such as pedestrian,[40] or to use in certain seasons of the year.[41] Limitations must not be inconsistent with legal character of dedication,[42] or with statutory power of cities to control and regulate streets,[43] and while a limitation may impose a condition that the expense of turning land dedicated into a street shall be borne by the public and not by the abutting property owners,[44] no limitation which takes the time and character of improvements or the complete supervision of the street out of the public can be tolerated.[45] Limitations can not be imposed after dedication.[46]

[33]Chicago, M. &c. R. Co. v. Chicago, 264 Ill. 24, 105 N. E. 702.

[34]Lee v. Harris, 206 Ill. 428, 69 N. E. 230, 99 Am. St. 176.

[35]Dewey v. Chicago, 274 Ill. 268, 113 N. E. 599.

[36]Kennedy v. Cumberland, 65 Md. 514, 9 Atl. 234, 57 Am. Rep. 346.

[37]Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378.

[38]Streuber v. Alton, 319 Ill. 43, 149 N. E. 577, 41 A. L. R. 1405.

[39]Buffalo, L. &c. R. Co. v. Hoyer, 214 N. Y. 236, 108 N. E. 455.

[40]Home Laundry Co. v. Louisville, 168 Ky. 499, 182 S. W. 645.

[41]Hughes v. Bingham, 135 N. Y. 347, 32 N. E. 78.

[42]Lynchburg Traction &c. Co. v. Lynchburg, 142 Va. 255, 128 S. E. 606, 43 A. L. R. 752.

[43]Henderson Elevator Co. v. Henderson, 187 Ky. 453, 219 S. W. 809, 18 A. L. R. 983.

[44]Perth Amboy Trust Co. v. Perth Amboy, 75 N. J. L. 291, 68 Atl. 84.

[45]Richards v. Cincinnati, 31 Ohio St. 506.

[46]Cohoes v. Delaware &c. Canal Co., 134 N. Y. 397, 31 N. E. 887.

The public may refuse to accept what is offered,[47] yet to vest easement in dedicatee the terms must be strictly complied with,[48] and acceptance in violation to the limitations is a nullity if objection is seasonably made,[49] but if the dedicatee has with the knowledge of the dedicator spent money in improving the land dedicated in a manner contrary to the conditions, it will be considered that the latter has waived the conditions.[50] The public has the power to accept a dedication but not the conditions.[51]

VII. PRESUMPTIONS.

[§ 377.]—Inasmuch as an easement will confer upon the public all the rights intended in a dedication,[52] an easement rather than the vesting of fee is presumed,[53] and where platted streets are appurtenant to land a public rather than a private easement is naturally assumed.[54]

License never raises a presumption of dedication[55] and a user is presumed to be permissive, not adverse.[56] Acts such as raise a presumption may be rebutted[57] except where its overthrow would operate as fraud on innocent parties.[58] The owner's knowledge of public use is not presumed from public use alone,[59] and no presumption arises from acts and conduct of tenants unless it is shown that such are authorized or participated in by owner.[60] Intention to dedicate

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[47]Duluth v. St. Paul &c. R. Co., 49 Minn. 201, 51 N. W. 1163.

[48]Jacobs Pharmacy Co. v. Luckie, 143 Ga. 457, 85 S. E. 332.

[49]Home Laundry Co. v. Louisville, 168 Ky. 499, 182 S. W. 645.

[50]Forney v. Calhoun County, 86 Ala. 463, 5 So. 750.

[51]Neagle v. Tacoma, 127 Wash. 528, 221 Pac. 588.

[52]Bradley v. Crane, 201 N. Y. 14, 94 N. E. 359.

[53]Hoxie v. Gibson, 150 Ark. 432, 234 S. W. 490; Savannah v. Barnes, 148 Ga. 317, 96 S. E. 625, 9 A. L. R. 419; Tweddell v. South Orange, 95 N. J. L. 327, 112 Atl. 511; State v. Frank W. Coy R. E. Co., 44 R. I. 357, 117 Atl. 432.

[54]Denver v. Clements, 3 Colo. 472; Du Pont v. Miller, 310 Ill. 140, 141 N. E. 423.

[55]Cincinnati &c. R. Co. v. Roseville, 76 Ohio St. 108, 81 N. E. 178.

[56]F. A. Hihn Co. v. Santa Cruz, 170 Cal. 436, 150 Pac. 62.

[57]Louisville &c. R. Co. v. Bailey, 33 Ky. L. 179, 109 S. W. 336.

[58]Kuck v. Wakefield, 58 Ore. 549, 115 Pac. 428.

[59]Davis v. Bonaparte, 137 Iowa 196, 114 N. W. 896.

[60]Cockrell v. Dallas (Tex. Civ. App.), 111 S. W. 977.

will be more readily presumed in regard to urban than to country property and to well settled country than to wild waste land.[61] Where the circumstances are incompatible with dedication, the presumption of such fails.[62] Thus where the law requires streets to be of a certain width, a plat showing ways of a lesser width does not constitute a dedication,[63] and where a map was not authorized by the owner, the assessment by reference thereto against protests of the owner who insisted upon acreage, did not affect a dedication.[64] Where a tender of lands for streets is made by filing plat, it is presumed that tender continues until some definite act indicates a definite and permanent withdrawal,[65] and an alteration in a plat is presumed to be made before filing.[66] A thoroughfare rather than a cul de sac is presumed,[67] and a street dedicated for street purposes is presumed to have roadway and sidewalks.[68] Where there is nothing to indicate a contrary intention an owner is presumed to dedicate the land for a road to the full width as specified in the statutes pertaining to highways,[69] but this presumption may be rebutted as where a fence on one side and a natural barrier on the other limits the use of the roadbed to a lesser width.[70] It is presumed that the acceptance is of the full width shown on the recorded plat although it is not so improved immediately.[71]

Where the use is beneficial an acceptance is presumed,[72]

[61]Wiehe v. Pein, 281 Ill. 130, 117 N. E. 849.

[62]State v. Brown, 6 Boyce (29 Del.) 179, 97 Atl. 590.

[63]McCutcheon v. Terminal Station Comm., 88 Misc. 601, 151 N. Y. S. 451. See § 375, supra.

[64]Burk v. Santa Cruz, 163 Cal. 807, 127 Pac. 154.

[65]Kenwood Park v. Leonard, 177 Iowa 337, 158 N. W. 655.

[66]White Bear v. Stewart, 40 Minn. 284, 41 N. W. 1045.

[67]Watertown v. Troeh, 25 S. Dak. 21, 125 N. W. 501.

[68]Georgetown v. Hambrick, 127 Ky. 43, 104 S. W. 997, 128 Am. St. 333, 13 L. R. A. (N. S.) 1113.

[69]Kruger v. LeBlanc, 70 Mich. 76, 37 N. W. 880.

[70]Smith v. Rogers, 227 Mich. 280, 198 N. W. 936.

[71]Kuehl v. Bettendorf, 179 Iowa 1, 161 N. W. 28.

[72]Ramstad v. Carr, 31 N. Dak. 504, 154 N. W. 195, L. R. A. 1916B, 1160.

and in highways very slight circumstances are sufficient for the presumption.[73] If a burden is imposed, acceptance is not presumed, although the use is beneficial, and very strong evidence is required where the street is not needed for public accommodation,[74] and like the offer, the acceptance must be shown by some unequivocal act.[75]

Although where title is not involved there is some authority apparently to the contrary,[76] it is generally held that there is no presumption that the party making the dedication was the owner, and that such fact must be established by the party claiming the dedication[77] upon whom the burden of proof is imposed.[78] Likewise the proof of the intention to dedicate,[79] and the burden of proving acceptance[80] is upon the one asserting it. The extent of a dedication must be proved by party setting up same,[81] and where dedication is set up in defense of trespass, the defendant must prove same.[82] However the establishment of certain facts may shift the burden of proof. Thus where owner has acquiesced in use he must show that such use was not inconsistent with private ownership.[83]

VIII. RIGHTS AND OBLIGATIONS.

[§ 378.] (A) Of Dedicator.—A common law dedication conveys only an easement to the public, and the dedicator retains fee and all property rights which are not in-

[73]Rose v. Elizabethtown, 275 Ill. 167, 114 N. E. 14.

[74]H. A. Hillmer Co. v. Behr, 264 Ill. 568, 106 N. E. 481.

[75]Wiley v. Poe, 31 Ill. App. 609.

[76]Fowler v. Linquist, 138 Ind. 566, 37 N. E. 133.

[77]Edenville v. Chicago, M. &c. R. Co., 77 Iowa 69, 41 N. W. 568; Lawrenceburg v. Wesler, 10 Ind. App. 153, 37 N. E. 956.

[78]Attorney General v. Lakeview Land Co., 143 Ala. 291, 39 So. 303.

[79]Littlefield v. Hubbard, 124 Maine 299, 128 Atl. 285, 38 A. L. R. 1306.

[80]Kirkland v. Tampa, 75 Fla. 271, 78 So. 17.

[81]Victoria v. Victoria County, 103 Tex. 477, 128 S. W. 109, 129 S. W. 593.

[82]District of Columbia v. Robinson, 180 U. S. 92, 45 L. ed. 440, 21 Sup. Ct. 283.

[83]Canton Co. v. Baltimore, 104 Md. 582, 65 Atl. 324.

consistent with public use.[84] On the other hand in certain jurisdictions a statutory dedication confers title upon the municipal corporation.[85] This distinction is aptly illustrated in Chicago where certain streets were dedicated by plats conforming in all particulars with the statutes, and the fee was therefore in the city, while others were dedicated by plats not complying strictly to the statutes, and therefore, acting as common-law dedications, left the fee subject to the public easement to the street in the abutting owners. In the former streets the city could charge the owners of lots abutting for the use of subsidewalk space,[86] while in the latter the owners could use such space without payment.[87]

The dedicator retains the right to lay sewer pipes,[88] and owns all water pipes he has laid in the street even though this may be done after dedication.[89] The dedicator may build over an alley provided only this does not interfere with traffic,[90] and is precluded only from doing that which interferes with reasonable use.[91] Where the dedication does not convey the fee to the city but merely an easement for street purposes, the dedicator retains his right to the soil and minerals beneath the street, and where he sells the abutting lots without reservation such right passes to the grantees of the lots,[92] but where a statutory dedication vests the fee in the city, the dedicator retains no interest in the street except that in common with the public, namely the right of passage over them, and in general neither he nor his grantees may remove the coal beneath the streets,[93]

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[84]Stevenson v. Chattanooga, 20 Fed. 586.

[85]Tri-city Art. Ice Co. v. Day, 292 Ill. 545, 127 N. E. 106.

[86]Williams v. Chicago, 247 Ill. 240, 93 N. E. 165.

[87]Ryerson v. Chicago, 247 Ill. 185, 93 N. E. 162. See § 234, supra.

[88]Appeal of McElhone, 118 Pa. 600, 12 Atl. 564.

[89]Wells v. Croton, 69 Misc. 97, 124 N. Y. S. 1058.

[90]Sutton v. Groll, 42 N. J. Eq. 213, 5 Atl. 901.

[91]Hudson v. Carrithers, 201 Ill. App. 153.

[92]Snoddy v. Bolen, 122 Mo. 479, 25 S. W. 932, 24 L. R. A. 507.

[93]Union Coal Co. v. LaSalle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A.

and their rights to the same are confined to those arising from a right of reversion.[94] These rules do not apply to land dedicated for quasi public uses (such as schools, churches, courthouses) where the rights of dedicator are no greater than those of others.[95] Heirs, assigns and grantees are bound by a dedication[96] and take fee to the center line of a way or limit of grantor's fee subject to the public easement unless it is otherwise stated.[97] If the fee subject to easement is taken by the state, municipality or corporation under the right of eminent domain, the owner of the fee while he may have to pay benefits can be awarded nominal damages only if use is not changed.[98] This is based on the assumption that by dedication he has already given and therefore can not make a claim, but the rule is otherwise where there is mere license to use until streets are opened, and under such circumstances the owners of the bed at time of the taking over by the public authorities are entitled to compensation.[99] Property dedicated can not be used for another public purpose inconsistent with the dedication,[1] and if the use is changed compensation must be made to the owner in fee as well as persons enjoying the use.[2] Where the right of way for a county highway was contingent upon the construction of an improved road to the county seat, the dedicator could maintain an action for

326; Des Moines v. Hall, 24 Iowa 234.

[94]Prall v. Burckhartt, 299 Ill. 19, 132 N. E. 280, 18 A. L. R. 992. See also Mattheisen & Hegeler Zinc Co. v. LaSalle, 117 Ill. 411, 8 N. E. 81. To the contrary, see § 273, supra.

[95]Bennington County v. Manchester, 87 Vt. 555, 90 Atl. 502.

[96]Demopolis v. Webb, 87 Ala. 659, 6 So. 408.

[97]Banks v. Ogden, 2 Wall. (69 U. S.) 57, 17 L. ed. 818.

[98]Moale v. Baltimore, 5 Md. 314, 61 Am. Dec. 276. See Regional Survey of New York, Vol. II, page 220.

[99]Pittsburgh v. Baltimore, 73 Md. 326, 21 Atl. 52.

[1]Poole v. Rehoboth, 9 Del. Ch. 192, 80 Atl. 683. See § 388, infra.

[2]Troy v. Watkins, 201 Ala. 274, 78 So. 50.

damages in way of compensation when county failed to complete road.[3]

[§ 379.] (B) **Of Public.**—The public takes nothing from the grantor which he did not intend to give, but all that he did,[4] and party making dedication can not object to such use whether it owns the fee or only a right of way.[5] The legislature or municipalities acting under legislative authority can apply dedicated property to all public and beneficial purposes consistent with the dedication and can regulate the public use of the same,[6] and where the dedication specifies no particular use it may define same;[7] especially where dedication is for "such public purposes as future incorporated authorities of said city from time to time declare and determine."[8] The municipality may and should prevent perversion to other uses by the removal of obstacles[9] and the institution of suits to preserve use for which the dedication was made,[10] and this applies to territory taken into the corporation after the dedication as well as that within the same at the time of dedication.[11] It has been held that a dedication implies the right to grade to make a street passable, and the fact that such grading makes egress and ingress of dedicator difficult is not ground for action,[12] and likewise it has also been held that a municipality is liable for damages when establishing an official grade where such was adverse to and unforeseen by dedicator.[13] The public takes property when dedicated

[3]Flynn v. Beaverhead County, 54 Mont. 309, 170 Pac. 13.

[4]Poole v. Rehoboth, 9 Del. Ch. 192, 80 Atl. 683.

[5]Michigan Cent. R. Co. v. Hammond, W. &c. Elec. R. Co., 42 Ind. App. 66, 83 N. E. 650.

[6]Coffin v. Portland, 27 Fed. 412.

[7]Burlington Gaslight Co. v. Burlington C. R. &c. R. Co., 91 Iowa 470, 59 N. W. 292.

[8]Futterer v. Sacramento, 196 Cal. 248, 237 Pac. 48.

[9]Newton v. Dallas (Tex. Civ. App.), 201 S. W. 703.

[10]Atlanta &c. R. Co. v. Atlanta, 156 Ga. 251, 119 S. E. 712.

[11]Brickell v. Fort Lauderdale, 75 Fla. 622, 78 So. 681.

[12]Hickman v. Clarksburg, 81 W. Va. 394, 94 S. E. 501.

[13]Partridge v. Richmond, 36 Cal. App. 389, 172 Pac. 166.

subject to inconvenience and risks, and while it may remove ordinary obstacles to make the surface smooth and clean, it has no right to remove steps, etc., which do not interfere with its use.[14] When the dedication is accepted either expressly or implied by proper authorities, the way must be kept in repair, and the municipality is liable for injuries due to neglect to do so.[15]

[§ 380.] (C) Of Third Parties.—Property dedicated to the public can not be alienated,[16] nor can it be seized or sold for debts of any person or corporation.[17] But where the mortgagee has not recognized the dedication, he may upon foreclosure revoke it.[18]

IX. REVOCATION.

[§ 380.1.] (A) Right to Revoke.—A common-law dedication is not binding until acceptance which must be within a reasonable time. Until it is accepted the dedicator has the right of revocation,[19] which right is gone upon acceptance.[20] It is generally held that a revocation can be made only by the power creating the dedication, that is, the original grantor,[21] and it is evident that a stranger to the title can not revoke.[22] Occupation of a dedicated way by the grantee does not constitute revocation,[23] but the contrary has been held under very particular circumstances in Indiana[24] where it was held that the original owner or his

[14]New Windsor v. Stocksdale, 95 Md. 196, 52 Atl. 596.

[15]Requa v. Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Fowler v. Linquist, 138 Ind. 566, 37 N. E. 133.

[16]Oakland Cemetery Co. v. Peoples Cemetery Co., 93 Tex. 569, 57 S. W. 27, 55 L. R. A. 503.

[17]Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197.

[18]Manning v. House, 211 Ala. 570, 100 So. 772. See § 361, supra.

[19]Meyers v. Oceanside, 7 Cal. App. 87, 93 Pac. 686.

[20]Stockwell v. Dunckel, 174 App. Div. 481, 159 N. Y. S. 32.

[21]Rathgaber v. Tonawanda, 59 Hun 628, 13 N. Y. S. 937, 37 N. Y. St. 807; San Antonio v. San Antonio Academy (Tex. Civ. App.), 259 S. W. 995.

[22]Wheeler v. Oakland, 35 Cal. App. 671, 170 Pac. 864.

[23]Rathgaber v. Tonawanda, 59 Hun 628, 13 N. Y. S. 937, 37 N. Y. St. 807.

[24]Indianapolis v. Board of Church Extension, 28 Ind. App.

grantees could revoke the dedication of a part of a way and that the city which had claimed and improved only a part of the width until the property dedicated had passed by conveyance into other hands and had been improved, could not avail itself of the use of the property involved for street purposes.

[§ 381.] **(B) Acts Constituting Revocation.**—The application of properties to uses inconsistent with dedication constitutes revocation[25] unless statutes limit the method of revocation to a certain specified procedure.[26] However where a highway is dedicated as having a specified width the use of the untravelled sides is not a revocation or limitation of the width to the actually travelled roadbed.[27] The death of the dedicator[28] or of one of several dedicators[29] before acceptance constitutes revocation. A change in the offer acts both as a revocation of the old dedication and a new offer of dedication.[30] The platting of land without sales is not a dedication but an offer to dedicate,[31] and prior to sale of lots or public use owner has complete possession,[32] and nothing prevents revocation.[33] This rule applies where the plat is recorded[34] and where the plat is made by persons not owning the land[35] especially where the owner promptly asserts his ownership over the land whenever occasion re-

319, 62 N. E. 715. See also Venice v. Madison County Ferry Co., 216 Ill. 345, 75 N. E. 105.

[25]Rose v. Elizabethtown, 275 Ill. 167, 114 N. E. 14.

[26]Lake View v. Le Bahn, 120 Ill. 92, 9 N. E. 269.

[27]People v. Langenour, 25 Cal. App. 44, 142 Pac. 888.

[28]Nicolls Copper Co. v. Connolly, 208 App. Div. 667, 203 N. Y. S. 839.

[29]Chicago, M. &c. R. Co. v. Chicago, 264 Ill. 24, 105 N. E. 702.

[30]In re Hunter, 47 App. Div. 102, 62 N. Y. S. 169.

[31]Kruger v. Constable, 116 Fed. 722; H. A. Hillmer Co. v. Behr, 264 Ill. 568, 106 N. E. 481.

[32]Le Roy v. Collins, 154 Mich. 77, 117 N. W. 579.

[33]Iglehart v. Chicago &c. R. Co., 241 Ill. 268, 89 N. E. 431; People v. Southern Pac. R. Co., 68 Cal. App. 153, 228 Pac. 726.

[34]Kenwood Park v. Leonard, 177 Iowa 337, 158 N. W. 655.

[35]Hope v. Shiver, 77 Ark. 337, 90 S. W. 1003.

quires[36] or where the land intended as a street is kept closed by the owner.[37]

[§ 382.] (C) **Statutory Provisions.**—In some jurisdictions certain statutes expressly give owners the right of revocation in whole or in part.[38] These usually provide that any plat may be vacated by the proprietor thereof at any time before the sale of any lots by a written instrument declaring the same to be vacated, executed, acknowledged, and recorded in the same office with the plat to be abandoned.[39] Certain conditions such as (1) vacation does not abridge or destroy any right or privilege of any property in the plat, (2) no public highway is obstructed or enclosed, and (3) streets shown on plat and needed by the public shall not be included in the vacation and shall remain as platted, are imposed. The term highway in such statutes is defined as a travelled way and not mere space between lots which may become streets.[40]

[§ 383.] (D) **Effect of Sales with Reference to Plat.**—The weight of authority is that the dedication of land for public use effected by platting and sale of lots with reference thereto is complete and irrevocable[41] even though

[36]Pitcairn v. Chester, 135 Fed. 587.

[37]Balmat v. Argenta, 123 Ark. 175, 184 S. W. 445.

[38]Kimball v. Chicago, 253 Ill. 105, 97 N. E. 257.

[39]Kenwood Park v. Leonard, 177 Iowa 335, 158 N. W. 655.

[40]Kenwood Park v. Leonard, 177 Iowa 335, 158 N. W. 655.

[41]Kruger v. Constable, 116 Fed. 722; Manning v. House, 211 Ala. 570, 100 So. 772; Thorpe v. Clanton, 10 Ariz. 94, 85 Pac. 1061; Brookfield v. Block, 123 Ark. 153, 184 S. W. 449; Reinhardt v. Chalfont, 12 Del. Ch. 214, 110 Atl. 663; Larkey v. Los Angeles, 70 Cal. App. 635, 233 Pac. 991; Green v. Curran, 77 Colo. 77, 235 Pac. 372; Hanson v. Proffer, 23 Idaho 705, 132 Pac. 573; Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883; Dubuque v. Maloney, 9 Iowa 450, 74 Am. Dec. 358; Kenwood Park v. Leonard, 177 Iowa 335, 158 N. W. 655 (incorporated municipalities only); Vinton v. Lyons, 131 La. 673, 60 So. 54; Bartlett v. Bangor, 67 Maine 460; Sanderson v. Baltimore, 135 Md. 509, 109 Atl. 425; Ralph v. Clifford, 224 Mass. 58, 112 N. E. 482; Poudler v. Minneapolis, 103 Minn. 473, 115 N. W. 274; Buschmann v. St. Louis, 121 Mo. 523, 26 S. W. 687; Shearer v. Reno, 36 Nev. 443, 136 Pac. 705; Simpson v. Klipstein, 89 N. J. Eq. 543, 105 Atl. 218; Harris v. Carter, 189 N. Car. 295, 127 S. E. 1;

there has been no formal acceptance by the public authorities, and although the public is not bound to maintain the streets until formally accepted by the authorities.[42] The basis of this rule is that the rights of the lot owners are founded on acts of the parties to the contract and not upon those of the municipal authorities,[43] and neither lapse of time nor the acts of the municipal government can waive the public rights for the purchasers of lots represent the public.[44] The statutes providing that no highway that is not laid agreeable to the statutes shall be deemed public unless used by the public, does not apply, but only frees the municipality from liability.[45]

These decisions apparently fail to differentiate between the termination of the right of revocation which ends with the sale of lots with reference to a plat, and the acquisition of rights by the public which can only accrue by some method of public acceptance.[46] Sound justice demands that, in the absence of a completed dedication which includes acceptance and the assumption by the public of responsibilities and liabilities, a city can not impose the burden of public travel upon a private way.[47] It is argued that the purchasers of lots represent the public and affect the acceptance,[48] but if the public is so little interested in the particulars as to leave the matter of acceptance to these random and self-appointed agents, it is logical to hold that

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Kee v. Satterfield, 46 Okla. 660, 149 Pac. 243; Menstell v. Johnson, 125 Ore. 150, 262 Pac. 853, 266 Pac. 891; Stoever v. Gowen, 280 Pa. 424, 124 Atl. 684; Krueger v. Gulf, C. &c. R. Co. (Tex. Civ. App.), 191 S. W. 151; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222; Sipe v. Alley, 117 Va. 819, 86 S. E. 122; Elkins v. Donohoe, 74 W. Va. 335, 81 S. E. 1130. See also Griffin v. Richardson, 83 W. Va. 442, 98 S. E. 523; and see note 49, infra.

[42]Kruger v. Constable, 116 Fed. 722.

[43]Bell v. Pittsburgh Steel Co., 243 Pa. 83, 89 Atl. 813.

[44]Meier v. Portland Cable R. Co., 16 Ore. 500, 19 Pac. 610, 615.

[45]Harrington v. Manchester, 76 N. H. 347, 82 Atl. 716.

[46]Mebane v. Wynne, 127 Ark. 364, 192 S. W. 221.

[47]Houston v. Finnigan (Tex. Civ. App.), 85 S. W. 470.

[48]Bell v. Pittsburgh Steel Co., 243 Pa. 83, 89 Atl. 813.

if these same agents are agreeable to the closing of the way, the public must abide by their actions. Following this or similar reasoning it is held in some jurisdictions that platting of land and sales with reference thereto is a mere offer to dedicate which may be withdrawn if not accepted by the public within a reasonable time,[49] or that such action constitutes a dedication of streets and alleys between the grantors and purchasers only[50] and that when the claims of the grantees are extinguished, revocation is permissible if the public has not acquired affirmative rights by adoption of the property set off for streets by official acts of the municipality or by user.[51] In such jurisdictions the dedication is revoked if before acceptance by the public there is vesting of the title to the alleged way in one person, as where the dedicator having deeded a lot calling for a street as a boundary, deeds the street to the same person.[52] However the conveyance of dedicated property is not a revocation when the dedication is completed prior to conveyance,[53] and it has been held that where the land in controversy has been dedicated to the public by the filing of a plat, a subsequent deed of dedicator to adjoining property the description of which includes the street did not constitute a revocation, but operated to convey to the grantee the fee in the street subject to public easement,[54]

[49]Mebane v. Wynn, 127 Ark. 364, 192 S. W. 221; Inyo County v. Given, 183 Cal. 415, 191 Pac. 688; Center v. Collier, 26 Colo. App. 354, 144 Pac. 1123; Miami v. Florida East Coast R. Co., 79 Fla. 539, 84 So. 726; Rose v. Elizabethtown, 275 Ill. 167, 114 N. E. 14; Beale v. Takoma Park, 130 Md. 297, 100 Atl. 379; Diamond Match Co. v. Ontonagon, 72 Mich. 249, 40 N. W. 448; Weihe v. Macatawa Resort Co., 198 Mich. 334, 164 N. W. 510; Stillman v. Olean, 228 N. Y. 322, 127 N. E. 267; Norfolk v. Nottingham, 96 Vt. 34, 30 S. E. 444. See note 42, supra.

[50]Smith v. King County, 80 Wash. 273, 141 Pac. 695.

[51]Beale v. Takoma Park, 130 Md. 297, 100 Atl. 379; Bissell v. New York Cent. R. Co., 26 Barb. (N. Y.) 630 (see also 23 N. Y. 61).

[52]Clendenin v. Maryland Const. Co., 86 Md. 80, 37 Atl. 709.

[53]Heitz v. St. Louis, 110 Mo. 618, 19 S. W. 735.

[54]State v. Southard, 6 Penniwill (Del.) 247, 66 Atl. 372.

and that a conveyance "together with his reversionary interest in the alleys in said block" is not a revocation.[55]

[§ 384.] (E) **Effect of Imposed Conditions.**—Where reasonable conditions which do not interfere with the public use or control are imposed, noncompliance with the same extends to the grantor the right to revoke and appropriate the land to his own use,[56] but this right is waived where no steps are taken until the dedicated property is improved.[57]

[§ 385.] (F) **Effect of Statutory Dedication.** — In some jurisdictions no acceptance is necessary to bind the dedicator when the dedication is strictly in accord with the statutes, and therefore revocation is impossible;[58] but in others the same rules apply to statutory dedications as to those made by methods of common law. Revocation may be made whole[59] or in part[60] but must be clear and conclusive,[61] and the burden of proof is on the party asserting it.[62] The rules applying to individuals apply as well to the nation, state, and municipality.[63]

X. ABANDONMENT.

[§ 386.] (A) **General.**—Abandonment occurs where the use for which property dedicated becomes impossible of execution,[64] or where the object of the user wholly fails.[65] The question of abandonment is held in some decisions to

[55]Zollinger v. Newton, 172 Iowa 352, 154 N. W. 611.

[56]People's Gas Light &c. Co. v. Chicago, 255 Ill. 612, 99 N. E. 703.

[57]Port Huron v. Chadwick, 52 Mich. 320, 17 N. W. 929.

[58]Hatton v. St. Louis, 264 Mo. 634, 175 S. W. 888.

[59]Myers v. Oceanside, 7 Cal. App. 87, 93 Pac. 686.

[60]Casey v. Chicago, 263 Ill. 147, 104 N. E. 1025.

[61]Kirkland v. Tampa, 75 Fla. 271, 78 So. 17.

[62]Kirkland v. Tampa, 75 Fla. 271, 78 So. 17.

[63]United States v. Illinois Cent. R. Co., 154 U. S. 225, 38 L. ed. 971, 14 Sup. Ct. 1015.

[64]Mahoning County v. Young, 59 Fed. 96; Newark v. Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843.

[65]Gaskins v. Williams, 235 Mo. 563, 139 S. W. 117, 35 L. R. A. (N. S.) 603.

be one of facts to be determined by the circumstances of each case,[66] and in others to be of mixed fact and law,[67] and the burden of proof is on the party asserting it.[68] In general prescription can not run against the rights of the public,[69] and the rights acquired by dedication can not be ordinarily lost by nonuse, estoppel, adverse possession, or laches[70] but nevertheless the public may relinquish its rights by abandonment.[71] A use not inconsistent with the declared purpose of dedication will not support the charge of abandonment.[72] The use of land by the owner consistent with the public rights,[73] the fencing of a way in a manner permitting the public to pass,[74] the temporary interruption of the use of a way,[75] an ordinance fixing wharf charges,[76] the collecting of taxes on land dedicated[77] do not constitute an abandonment.

[§ 387.] **(B) Effect of Acceptance.**—The right to accept may in a sense be lost by nonuse[78] but there is no such abandonment if the public asserts its rights within the prescribed time,[79] and where a plat making the dedication of a street reserved the right to enclose the same until use was necessary, abandonment by nonuser did not operate.[80]

After acceptance, or where acceptance is unnecessary,

[66]Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21, 113 Am. St. 170.

[67]Savannah v. Bartow Inv. Co., 137 Ga. 198, 72 S. E. 1095.

[68]Basic City v. Bell, 114 Va. 157, 76 S. E. 336.

[69]Kelsoe v. Oglethorpe, 120 Ga. 951, 48 S. E. 366, 102 Am. St. 138. See § 347, supra.

[70]Savannah v. Barnes, 148 Ga. 317, 96 S. E. 625; Douglas County v. Lawrence, 102 Kan. 656, 171 Pac. 610; Smith v. Rogers, 227 Mich. 280, 198 N. W. 936.

[71]Kelsoe v. Oglethorpe, 120 Ga. 951, 48 S. E. 366, 102 Am. St. 138.

[72]Clarke v. Evansville Boat Club, 44 Ind. App. 426, 88 N. E. 100.

[73]Wiehe v. Pein, 281 Ill. 130, 117 N. E. 849.

[74]Nelson v. Randolph, 222 Ill. 531 78 N. E. 914.

[75]Wheeler v. Oakland, 35 Cal. App. 671, 170 Pac. 864.

[76]Palen v. Ocean City, 72 N. J. L. 15, 62 Atl. 947.

[77]Humphrey v. Krutz, 77 Wash. 152, 137 Pac. 806.

[78]Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21, 113 Am. St. 170.

[79]Horton v. Okanogan County, 98 Wash. 626, 168 Pac. 479.

[80]Thonney v. Rice, 43 Wash. 708, 86 Pac. 713.

mere negative nonuse, unaccompanied by acts showing intention never to use, and not complicated by acts of private user, is not abandonment, and does not affect the rights of the public[81] regardless of length of time.[82] In general the abandonment must be expressed by an affirmative act[83] or legislative sanction,[84] and if the dedication is completed the public may begin the use or the municipality open the way at any time when convenience and necessity suggest.[85] The improvement of part only does not indicate the abandonment of the rest,[86] and the working of the travelled way of a highway does not constitute an abandonment of the land on the sides[87] even where a portion is fenced in with the abutting property.[88]

XI. MISUSE OR DIVERSION.

[§ 388.] (A) General.—Misuse or diversion is defined as any use inconsistent with or interfering with the particular use to which the property was dedicated,[89] and for diversion to exist the use must be inconsistent with the purpose of the dedication or substantially interfere with the contemplated use.[90] It is only when the dedication is general and without restrictions that the public has the use according to its desires,[91] and when the dedication is for specific purposes neither the legislature, the municipality, its successor, or the public can use for other purposes.[92] This is

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[81]London & San Francisco Bank, Ltd., v. Oakland, 90 Fed. 691.

[82]Smith v. Opelika, 165 Ala. 630, 51 So. 821.

[83]Henderson v. Blackwell, 189 Ky. 746, 226 S. W. 370.

[84]Stollenwerck v. Greil, 205 Ala. 217, 87 So. 338.

[85]People v. Johnson, 237 Ill. 237, 86 N. E. 676.

[86]Shirk v. Chicago, 195 Ill. 298, 63 N. E. 193.

[87]Santa Ana v. Santa Ana Valley Irr. Co., 163 Cal. 211, 124 Pac. 847.

[88]Southern Pac. R. Co. v. Ferris, 93 Cal. 263, 28 Pac. 828, 18 L. R. A. 510.

[89]Brown v. East Point, 148 Ga. 85, 95 E. 962.

[90]State v. Sandusky M. &c. R. Co., 111 Ohio St. 512, 146 N. E. 58.

[91]South Park Comrs. v. Montgomery Ward & Co., 248 Ill. 299, 93 N. E. 910. See § 379, supra.

[92]South Park Comrs. v. Mont-

not affected by the fact that the change might be of advantage to the public,[93] although some decisions recognize a limitation to this general rule and hold that if the fee of the dedicated property is vested in municipality by absolute dedication, it may if authorized by legislation discontinue the use and apply the property to such purposes as it may see fit or convey the same.[94] In general misuse does not constitute abandonment[95] or cause land to revert to the dedicator[96] so long as the intended use is not rendered impossible thereby,[97] unless there is a stipulation in the instrument of dedication providing for forfeiture in case of diversion[98] or the misuse renders impossible the intended use.[99] In such a case the land reverts to the dedicators or their successors in title freed of the easement.

The hardest misuse to resist is that which is of greater efficiency than the purpose of the dedication. Thus where there is a twenty-acre green in the downtown section of a city, and it is surrounded by narrow streets, there is a decided temptation to take enough off each side to add two traffic lanes to the streets. If the widening is not extended beyond the green, and it merely serves as parking space, there is no question but what the misuse is unwarranted. But if such widening is a part of a more pretentious scheme for opening a boulevard through the business district, the question assumes a different aspect. The practical man who faces the traffic problem will favor such a misuse, while the sentimentalist will oppose it on general principles. It is clearly a matter for the public to decide through their

gomery Ward & Co., 248 Ill. 299, 93 N. E. 910. See § 379, supra.

[93]Poole v. Rehoboth, 9 Del. Ch. 192, 80 Atl. 683.

[94]Lake City v. Fulkerson, 122 Iowa 569, 98 N. W. 376. See § 273, supra.

[95]McAlpine v. Chicago Great Western R. Co., 68 Kans. 207, 75 Pac. 73.

[96]McAlpine v. Chicago Great Western R. Co., 68 Kans. 207, 75 Pac. 73.

[97]McAlpine v. Chicago Great Western R. Co., 68 Kans. 207, 75 Pac. 73.

[98]Thorndike v. Milwaukee Auditorium Co., 143 Wis. 1, 126 N. W. 881.

[99]Porter v. International Bridge Co., 200 N. Y. 234, 93 N. E. 716.

properly elected representatives, and these parties should carefully weigh the accruing advantages against the loss of open space. Such an inroad, no matter how practical and efficient, should be resisted until necessity absolutely forces it upon the public. Mere economy can never justify a misuse.

[§ 389.] (B) Uses Which Are Diversions.—Land dedicated for street purposes can not be used for a building,[1] park,[2] scales,[3] steam railways,[4] watertank,[5] wharf,[6] and where the dedication is for a sidewalk use for a street is a misuse.[7] Land dedicated for a church can not be used for a graveyard,[8] nor can land dedicated for the latter purpose be used as a park[9] and where the dedication is for land for a courthouse it can not be used for a jail and cesspool,[10] or comfort station.[11] Land dedicated for a park plaza or square can not be used for a city fire bell tower,[12] a stadium,[13] a city hall,[14] a public highway or street,[15] a schoolhouse,[16] a courthouse,[17] jail,[18] or swimming pool.[19] Some decisions hold that the erection of a library on land set

[1]Lutterloh v. Cedar Keys, 15 Fla. 306.

[2]Kennard v. Eyermann, 267 Mo. 1, 182 S. W. 737.

[3]Gibson v. Black, 10 Ky. L. 373, 9 S. W. 379.

[4]Western Railway of Alabama v. Alabama G. T. R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474.

[5]Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77.

[6]California Nav. &c. Co. v. Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825.

[7]Brown v. East Point, 148 Ga. 85, 95 S. E. 962.

[8]Price v. Methodist Episcopal Church, 4 Ohio St. 515.

[9]Campbell v. Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593.

[10]Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008.

[11]Clement v. Paris (Tex. Civ. App.), 154 S. W. 1624.

[12]Fessler v. Union, 67 N. J. Eq. 14, 56 Atl. 272.

[13]Miller v. Columbia, 138 S. Car. 343, 136 S. E. 484.

[14]Church v. Portland, 18 Ore. 73, 22 Pac. 528.

[15]Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288; Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615, 227 Pac. 649.

[16]Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. 625, 40 L. R. A. 402.

[17]Williams v. Gallatin, 229 N. Y. 248, 128 N. E. 121, 18 A. L. R. 1238.

[18]Kelly v. Hayward, 192 Cal. 242, 219 Pac. 749; Dunne v. Rock Island County, 273 Ill. 53, 112 N. E. 342.

[19]Hill v. Belmar, 3 Misc. (N. J.) 254, 127 Atl. 789.

aside for a park is a diversion,[20] while others maintain to the contrary and permit libraries as well as museums, art galleries, and conservatories.[21] Whether the use of land in a park for a museum is proper depends upon whether the purpose of the building is consistent with the purpose of the park, namely innocent recreation and refreshment of mind and body.[22] The size, character and location of the park as well as public opinion are vital factors, which make each case arising a distinct problem in itself. In general the value of open spaces in a city is inestimable, and the trend of public sentiment is to protect the same against encroachments. Land dedicated for public city buildings can not be used for a county courthouse[23] nor that given for a public market used as a street.[24]

[§ 390.] (C) Uses Which Are Not Diversions.—Dedicated property may be put to all customary uses within the definition of the use for which it was dedicated,[25] and the dedication of land for a street includes other uses than mere travel[26] such as for telephone poles,[27] electric light wires and poles,[28] sewers,[29] watermains,[30] railways,[31] consent of city necessary in some circumstances,[32] subway,[33] (provided such use does not interfere).

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[20]Hopkinsville v. Jarrett, 156 Ky. 777, 162 S. W. 85, 50 L. R. A. (N. S.) 465.

[21]Spires v. Los Angeles, 150 Cal. 64, 87 Pac. 1026.

[22]Williams v. Gallatin, 229 N. Y. 248, 128 N. E. 121, 18 A. L. R. 1238. See § 390, infra.

[23]McIntyre v. El Paso, 15 Colo. App. 78, 61 Pac. 237.

[24]Voinche v. Marksville, 124 La. 712, 50 So. 662.

[25]Brown v. East Point, 148 Ga. 85, 95 S. E. 962.

[26]Edison Illuminating Co. v. Misch, 200 Mich. 114, 166 N. W. 944.

[27]State v. Auffart, 192 Mo. App. 133, 180 S. W. 571.

[28]State ex rel. v. Dreyer, 229 Mo. 201, 129 S. W. 904.

[29]Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344.

[30]Wood v. National Water Works Co., 33 Kans. 590, 7 Pac. 233; Witcher v. Holland Waterworks, 65 Hun 624, 66 Hun 619, 20 N. Y. S. 560, 48 N. Y. St. 196.

[31]State ex rel. v. Sandusky M. &c. R. Co., 111 Ohio St. 512, 146 N. E. 58; State ex rel. v. Dreyer, 229 Mo. 201, 129 S. W. 904.

[32]Paterson &c. R. Co. v. Paterson, 24 N. J. Eq. 158.

[33]State ex rel. v. Dreyer, 229 Mo. 201, 129 S. W. 904.

The dedication by a map or plat does not compel the municipality to divide the street into roadway and sidewalks for discretion is left in the municipality.[34] Land dedicated for commons or public squares may be used for wharves,[35] monuments[36] or subways.[37] Levees may be used for railways where such does not interfere but rather aids the ordinary use,[38] and where several streets open on a levee and many lots have no other means of ingress or egress, dedication as a levee includes the use as a street as well as for a landing place for boats.[39] Land dedicated for parks may be used for pavilion to provide shelter,[40] tennis courts and playgrounds,[41] monuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor, floral and horticultural displays, zoological gardens, playgrounds and even rest houses and restaurants, and other uses which add to the public enjoyment of the park as such are proper.[42] Where the dedication is for general public use municipal buildings[43] and schools may be erected thereon.[44]

[§ 391.] (D) Necessary Assent.—In case all the parties interested, that is the dedicator, general public, property owners having particular and peculiar interests, assent the use for which the property is dedicated may be changed or destroyed,[45] but no one party without the consent of the others can effect a change,[46] and consent to a designated

[34]Jones v. Houston (Tex. Civ. App.), 188 S. W. 688.

[35]Newport v. Taylor, 16 B Mon. (55 Ky.) 699.

[36]Hoyt v. Gleason, 65 Fed. 685,

[37]Codman v. Crocker, 203 Mass. 146, 89 N. E. 177.

[38]State v. Dreyer, 229 Mo. 201, 129 S. W. 904.

[39]McAlpine v. Chicago Great Western R. Co., 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85.

[40]Dodge v. North End Imp. Assn., 189 Mich. 16, 155 N. W. 438.

[41]Caulfield v. Berwick, 27 Cal. App. 493, 150 Pac. 646.

[42]Williams v. Gallatin, 229 N. Y. 248, 128 N. E. 121, 18 A. L. R. 1238.

[43]Commissioners v. Burgess, 201 Pa. 154, 50 Atl. 825.

[44]Reid v. Board of Education, 73 Mo. 295.

[45]Board of Education v. Kansas City, 62 Kans. 374, 63 Pac. 600.

[46]Board of Education v. Kansas City, 62 Kans. 374, 63 Pac. 600.

use does not give consent to a use other than that designated.[47]

[§ 392.] **(E) Proceedings to Prevent Change.** — In cases of diversion the dedicator as trustee for the public, if not as owner of adjacent lands, may maintain suit to prevent the same against the dedicatee, or a third person[48] interfering with the use,[49] or against the dedicatee and such third persons.[50] The dedicator's grantees expressly or by implication as abutting owners succeed to his rights,[51] for parties to whom he has sold land covenanting for a public use have the right to sue upon the covenants.[52] The particular interests of owners of property abutting on parks, streets, and highways extend them the right to institute proceedings to prevent diversion,[53] and this right is not affected by nonacceptance by the municipality,[54] but of course does not hold where the fee in the owner of the abutting property predated the dedication of a park.[55] Some decisions hold that this right of an abutting owner is not abridged by the fact that dedication is statutory and therefore the fee in street or land is not in him,[56] but other authorities maintain that where the title is in the municipality, abutting owners have no interests in the dedicated property differing from others and are not entitled to maintain suit for diversion unless they can show a specific and particular interest due to some cause such as the location of their property relative to the dedicated land in ques-

[47]Fessler v. Union, 67 N. J. Eq. 14, 56 Atl. 272.

[48]State v. Trask, 6 Vt. 355, 27 Am. Dec. 544.

[49]Pomeroy v. Mills, 3 Vt. 279, 23 Am. Dec. 207.

[50]Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. 625, 40 L. R. A. 402.

[51]Island Heights Hotel &c. Co. v. Freeman, 77 N. J. Eq. 569, 78 Atl. 157.

[52]Trutt v. Spotts, 87 Pa. 339; King v. North Chesapeake Beach L. & Imp. Co., 143 Md. 693, 123 Atl. 455.

[53]Calkins v. Westervelt, 214 Fed. 415; Brown v. Manning, 6 Ohio St. 298, 27 Am. Dec. 255.

[54]Marsh v. Fairbury, 163 Ill. 401, 45 N. E. 236.

[55]Calkins v. Westervelt, 214 Fed. 415.

[56]Stange v. Hill &c. St. R. Co., 54 Iowa 669, 7 N. W. 115.

tion.[57] A citizen may maintain a proceeding by mandamus to compel officials to perform their duty and remove unlawful obstructions and nuisances in public streets, but an action in equity must be brought and maintained in the name of the municipal corporation unless a designated officer is authorized to bring suit.[58] Some decisions hold that any inhabitant or citizen of a town with no specific property interest may maintain proceedings to prevent diversion[59] on the grounds that they have paid taxes for the maintenance of the property in question and therefore have acquired rights, but it has also been held[60] that to maintain such action the party must sustain some specific and peculiar damage[61] or have some special right.[62] The municipality in which the land is situated as trustee for the public may[63] and should maintain action to prevent diversion,[64] and this applies even though they are not the holder of the fee simple,[65] and it is not essential that to exercise this right the municipality should have previously obligated itself to maintain and repair the streets.[66] This applies to territory taken into the corporate limits after dedication as well as to territory included at the time of dedication.[67] Municipalities and citizens thereof may join to enforce and preserve a use,[68] and any person who obstructs a public use may be

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[57]Thorndike v. Milwaukee Auditorium Co., 143 Wis. 1, 126 N. W. 881.

[58]Pounds v. Lee Ave. Theater Co., 84 Misc. 623, 147 N. Y. S. 815.

[59]Philadelphia Museums v. Pennsylvania University, 251 Pa. 115, 96 Atl. 123; Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. 625, 40 L. R. A. 402.

[60]Norfolk v. Nottingham, 96 Va. 34, 30 S. E. 444.

[61]Burnet v. Bagg, 67 Barb. N. Y. 154; Norfolk v. Nottingham, 96 Va. 34, 30 S. E. 444.

[62]Antonakas v. Anderson Chamber of Commerce, 130 S. Car. 215, 126 S. E. 35; Dyer v. Philadelphia, 276 Pa. 348, 120 Atl. 416.

[63]Atlanta &c. R. Co. v. Atlanta, 156 Ga. 251, 119 S. E. 712.

[64]Brickell v. Ft. Lauderdale, 75 Fla. 622, 78 So. 681.

[65]Brigantine v. Holland Trust Co. (N. J.), 35 Atl. 344.

[66]Brigantine v. Holland Trust Co. (N. J.), 35 Atl. 344.

[67]Brickell v. Ft. Lauderdale, 75 Fla. 622, 78 So. 681.

[68]Watertown v. Cowen, 4 Paige Ch. (N. Y.) 510, 27 Am. Dec. 80.

sued.[69] The legislature is primarily the representative of the people and has the power to regulate the use in conformity with the dedication.[70]

XII. DEDICATION A CONCERN OF THE COMMUNITY.

[§ 393.] Regional planning aims to provide for the economic and efficient use of land with due regard to the physical characteristics of the territory and to the existing city, town and village development. The work of such commissions is not routine but creative, and the technical supervision of the platting of land is but a detail entrusted to its engineers for administration. On the other hand the coordination of the various developments within an area is, as has been noticed, an administrative matter which calls for tact and diplomacy, and rests upon the police powers of the state. The experiences of the regional commissioners is certain to be reflected in the future development of dedication. This fact promises that the troublesome detail of acceptance will ultimately be viewed from the standpoint of the pioneer residents of the new developments and that the obligation of the public to its new citizens will be recognized.

Dedication involves the interests of the developer, the purchasers, and the general public, and its efficient utilization in regional planning depends more upon competent administration than upon the details of law. An able commission backed by a local government that serves the community can accomplish more under faulty statutes than a board of political appointees cooperating with a county commission that functions as a cog in the state machine can achieve with a model code.

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[69]Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. 625, 40 L. R. A. 402.

[70]Hoboken Cemetery v. Griffin, 88 N. J. L. 111, 95 Atl. 758.

CHAPTER IX.

ADJOINING LAND OWNERS.

I. RIGHTS AND DUTIES.

Section.
394. General.
395. Unskillful and Negligent Use.
396. Wrongful Use—General.
397. Blasting.

II. ENCROACHMENTS.

398. General.
399. Nature.
400. Abatement.

III. RIGHT TO LATERAL SUPPORT.

401. Land in Natural Condition.
402. Land with Buildings—General.
403. Right Acquired by Grant.
404. Right Not Acquired by Prescription.
405. Support from Nonadjacent Land.

IV. RIGHT TO EXCAVATE.

406. Adjacent Land in Natural Condition.
407. Buildings on Adjacent Land—General.
408. Interpretation of the Rule—Ordinary Care and Skill Required.
409. Notice Necessary.
410. Shoring Not Required.
411. Effect of Statutory Regulation.

V. LIABILITY FOR DANGEROUS CONDITIONS.

412. Liability for Dangerous Conditions.

VI. RIGHT TO LIGHT AND AIR.

413. Right to Light and Air.

VII. TREES.

414. Near the Line.
415. On the Line.

VIII. FENCES.

416. Definition.
417. Sufficiency—Common Law.
418. Statutory Provisions.
419. Partitions Fences—Rights and Duties of Owners.
420. Location.
421. Ownership.
422. Removal and Destruction—Civil Liability.
423. Criminal Liability.
424. Spite Fences—Legality.
425. Statutory Regulations.

IX. PARTY WALLS.

426. Definition and Nature of Ownership.
427. Structures Constituting Party Walls.
428. Creation and Existence—By Agreement.
429. By Prescription.
430. Effect of Sale by Owner.
431. Statutory Regulation.
432. Duration of Party Wall Easement.
433. Rights, Duties and Liabilities of Owners—In Respect to Construction.
434. In Respect to Repairs.
435. In Respect to Insufficiency.
436. In Respect to Use by Non-building Owner.
437. In Respect to Windows and Openings.
438. Rights and Liabilities of Successors in Title—Payment for Use.
439. Necessity of Notice.

I. RIGHTS AND DUTIES.

[§ 394.] (A) **General.**—"Each of two adjoining land-owners has definite rights to the use and enjoyment of his property, and each must concede something for the preservation of the other. Where conflict is irreconcilable, right to use one's own property must prevail, but the owner may do so without compensation only where the resulting damage is not avoidable at all, or where the expense of obviating it would be practically prohibitory."[1] The respective duties which adjoining land owners in a town, mutually improving their property, owe one to another, are those only which the requirements of good neighborhood in such a town would impose, that is, each must use due care and prudence to protect his neighbor, but is not bound in all events and under all circumstances to protect him; and any injury that may result notwithstanding the observation of proper caution must be deemed incident to ownership of town property and can give no right of action, and injuries from extraordinary or accidental circumstances for which no one is at fault must be left to be borne by those on whom they fall.[2]

[1]Per Orlady, J., Wahl v. Vetter, 38 Pa. Super. Ct. 234, 237.

[2]Page v. Brooks, 79 N. H. 70, 104 Atl. 786; Underwood v. Waldron, 33 Mich. 232.

The underlying principle upon which these citations rest is that the right to damages constituting a legal cause of action requires the concurrence of two things:

(1) That the party claiming them has suffered an injury;

(2) That there is some person legally answerable for having caused it.

If one suffers an injury for which no one is liable, there can be no legal claim for damages. Where there has been no violation of a right, the situation is described as "damnum absque injuria," that is an injury to a party not flowing from the wrongful act of anyone, and recovery is not permitted, no matter to what extent the plaintiff may sustain damages.[3]

"The test as to the permissible use of or action upon one's own land is not whether the use causes injury to the neighbor's property, or that the injury was the natural consequence, or the act is in the nature of a nuisance; but the inquiry is, was the act or use a reasonable exercise of the domain which the owner of property has by virtue of his ownership over his property, having regard to all the interests affected, his own and his neighbor's, and having in view, also, public policy?"[4]

[§ 395.] **(B) Unskillful or Negligent Use.**—The general principle that every owner has absolute domain over his property and has the right to use his own land in any way he desires, or take down or change any foundation or wall or other improvement, without being answerable for the consequent injury to his neighbor's house or building, is subject to the qualification that he must exercise due care and skill, and that he will be liable in damages if the

[3]Bicak v. Runde, 78 Misc. 358, 138 N. Y. S. 413.

[4]Andrew, C. J., Booth v. Rome, W. &c. R. Co., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. 552.

injury to his neighbor is occasioned by the negligent and unskillful manner in which the work is performed.[5] Where the damage is caused by carelessness on the part of a contractor or one of his employees, the owner will not be liable unless—

(1) He personally interferes with the work and the acts performed by him occasion the injury;
(2) The thing contracted for is unlawful;
(3) The acts performed create a public nuisance;
(4) He is bound by statute to perform the work efficiently and the injury results from inefficiency,[6]

for the usual rules pertaining to independent contractors apply, and the relation of master and servant or principal and agent does not exist.[7] Supervision, however vigilant, if confined to enforcing the terms of the contract and insuring the quality of the work does *not* constitute *active participation* such as to render the owner liable for the negligence of the *contractor*.[8] However an owner may be liable when he knowingly makes a contract with a party whom he knows is in the habit of performing the required work contrary to the city ordinances,[9] and there is slight authority holding owner liable for the engagement of a competent contractor especially when the work involves anticipated hazards.[10]

[§ 396.] (C) **Wrongful Use.—(1) General.**—No one has a right to use his own property so as to injure others about him, not even those engaged in the most industrious and worthy enterprises. The use and enjoyment must have

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[5]Leavenworth Lodge No. 2 v. Byers, 54 Kans. 323, 38 Pac. 261.

[6]Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. 542.

[7]Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. 542.

[8]People v. Gaydica, 122 Misc. 31, 203 N. Y. S. 243.

[9]Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451.

[10]Gray, J., dissenting in Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. 542.

reference to the rights of others.[11] The construction of an embankment so as to force earth upon adjoining land,[12] the display of wares so as to interfere with light, air, and access,[13] obstructing ingress and egress,[14] turning waste water on land,[15] piling material against adjoining wall,[16] throwing earth against a building while grading,[17] have all been held wrongful uses. Furthermore the proprietor of a building has a right of action against one who has erected an adjoining building in violation of a statute regulating building within certain limits if he shows special damage sustained by himself in consequences of such erection;[18] but where there are no statutory requirements,[19] or where adjoining owner has himself built to the line in violation of the statute which he seeks to enforce against his neighbor,[20] there exists no such right of action.

[§ 397.] (2) **Blasting.**—Some jurisdictions hold that blasting is an unreasonable and unnatural use of property, and that no care or skill in so doing can excuse the owner from damages actually done to adjoining premises as the natural and proximate result.[21] It has also been held that the well settled rule that negligence need not be shown to recover damages caused by matter thrown by blasting on adjacent land applies also to the recovery for damages resulting to adjacent property from blasting and other opera-

[11]Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821, 64 L. R. A. 228; Kobielski v. Belle Isle East Side Creamery Co., 222 Mich. 656, 193 N. W. 214, 31 A. L. R. 183.

[12]Costigan v. Pennsylvania R. Co., 54 N. J. L. 233, 23 Atl. 810.

[13]Lavery v. Hannigan, 52 N. Y. Super. 463.

[14]Rutter v. Fidler, 11 Pa. 181.

[15]Chicago &c. R. Co. v. Hoag, 90 Ill. 339.

[16]Barnes v. Masterson, 38 App. Div. 612, 56 N. Y. S. 939.

[17]Hutchinson v. Schimmelfelder, 40 Pa. 396, 80 Am. Dec. 582.

[18]Aldrich v. Howard, 7 R. I. 199.

[19]Ray v. Sweeney, 14 Bush (77 Ky.) 1, 29 Am. Rep. 388.

[20]Rudnick v. Murphy, 213 Mass. 470, 100 N. E. 643.

[21]Gilbert v. Evens & Howard F. B. Co., 214 Mo. App. 207, 260 S. W. 790; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; Muskogee v. Hancock, 58 Okla. 1, 158 Pac. 622.

tions in the construction of a railroad tunnel causing vibration or concussion, although no matter was thrown on adjacent land.[22] This is a matter in which the local geological conditions play an important part. If the above citations were regarded in New York City the development of Manhattan Island would be greatly retarded, if not rendered impossible. There it is held that where adjacent lots are situated on the same stratum of rock, either owner may do the necessary blasting on his premises by the usual means, and neither obtains any right over the other by being the first to do so. Proximity imposes an obligation of care, but it can not exclude the late comer from using the necessary means of improving his lot. To preclude blasting would not be a compromise of rights, but an extinguishment of the right of one for benefit of the other, a sacrifice that the law does not exact.[23] If blasting is carried on in a reasonable manner no recovery can be had for injuries caused thereby to adjoining properties, but if the injury is occasioned by the omission of due care, this alone would sustain the action even if the right of the use of explosives in removing rock is conceded.[24] Where blasting is in a manner that throws fragments through the air and causes buildings to rock and walls to crack, the use is unreasonable.[25]

An owner has the right to use his property within the law as he may desire only where the resulting damage is unavoidable, and this has a direct bearing on blasting. Thus where blasting is resorted to for the removal of stumps or hard heads, the owner may be liable regardless of the ex-

[22]Hickey v. McCabe, 30 R. I. 346, 75 Atl. 404; Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076, 48 L. R. A. (N. S.) 740; Fitzsimons &c. Co. v. Braun, 199 Ill. 390, 65 N. E. 249; Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co., 60 Ohio St. 560, 54 N. E. 528, 71 Am. St. 740, 45 L. R. A. 658.

[23]DeCarvajal v. Young Men's Christian Assn., 37 Misc. 727, 76 N. Y. S. 474.

See also Green v. General Petroleum Corp. (Cal.), 270 Pac. 952 revg. 262 Pac. 377.

[24]Booth v. Rome, W. &c. R. Co., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. 552.

[25]Stevenson v. Pucci, 32 Misc. 464, 66 N. Y. S. 712.

treme care and precautions he uses, because the tractor in many instances places at his command a means of accomplishing the same end at slight additional expense. In general the measure of damages for blasting is the cost of repairs.[26]

II. ENCROACHMENTS.

[§ 398.] (A) General.—"An encroachment is a gradual entering on and taking possession by one of what is not his own; an unlawful gaining upon the rights and possessions of another."[27] It may also be defined as an intrusion, occupancy or use of another's land by a gradual or partial assumption of right to do so.[28] The maintenance of such an encroachment is a continuing trespass or nuisance[29] and the party injured thereby can maintain action although not in possession when the original trespass was committed. Before an encroachment has ripened into a right by adverse possession, the owner of the land encroached upon may use land in the same manner that he might have used it if the encroachment did not exist, and the encroaching owner has not the right to object to, or any remedy for, any proper use the owner encroached upon may make of the property.[30] Thus when one puts beams into another's wall, he can not complain when the latter takes down the wall.[31] The owner of land encroached upon by a wall may use the same without contributing to the cost of its erection, and it thereby does not necessarily become a party wall.[32] In absence of estoppel the owner of the land encroached upon can not be compelled to convey title to such part to the adjoining

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[26]Fitzsimons &c. Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421.

[27]Meservey v. Gulliford, 14 Idaho 133, 93 Pac. 780, 786.

[28]Johnston v. Long Island Inv. &c. Co., 85 App. Div. 60, 82 N. Y. S. 961.

[29]Wells Amusement Co. v. Eros, 204 Ala. 239, 85 So. 692; Milton v. Puffer, 207 Mass. 416, 93 N. E. 634, 32 L. R. A. (N. S.) 1010.

[30]Lotz v. Scott, 103 Ind. 155, 2 N. E. 560.

[31]Roberts v. White, 25 N. Y. Super. 425.

[32]Nilson v. Kahn, 314 Ill. 275, 145 N. E. 340.

owner upon his payment of its value.[33] When soil or other material slides upon adjacent land, the adjoining owner may compel its removal, but he has no right or title to such material.[34]

[§ 399.] (B) **Nature.**—Decisions are not in harmony as to whether or not an encroachment[35] is a disseisin and ouster,[36] that is a wrongful dispossession not supported by good title, or a trespass,[37] that is an unauthorized and unlawful entry upon the land of another without a claim of right.[37a] To constitute a disseisin the possession must be exclusive, and encroachments may be such as are not exclusive. Thus the erection and maintenance of a structure projecting over the land of another is an invasion of his legal rights, which if continued long enough under a claim of right may ripen into an easement,[38] but it is not an ouster of possession. The adjoiner has the use of his ground, and this precludes the exclusiveness of his encroaching neighbor.

To the contrary authorities practically agree that the ability of the sheriff to deliver possession is a test of the right to maintain an action in ejectment. "Cuius est solum, eius est usque ad coelum et ad inferios." The surface of the ground is the guide, but not the full measure; for within reasonable limitations land includes not only the surface but also the space above and the part beneath. Wires or other structures over the land of one but not in any way supported thereon—supported by poles or structures on adjoining lands—effect a disseisin or ouster and afford owner

[33]Valentine v. Hynes, 199 Fed. 392.

[34]Preston Coal &c. Co. v. Raven Run Coal Co., 200 Fed. 465.

[35]See definitions, § 398, ubi supra.

[36]Murphy v. Bolger, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309; Haitsch v. Duffy, 10 Del. Ch. 280, 92 Atl. 249.

[37]Rasch v. Noth, 99 Wis. 285, 74 N. W. 820, 67 Am. St. 858, 40 L. R. A. 577; Earnest v. Little River Land &c. Co., 109 Tenn. 427, 75 S. W. 1122.

[37a]Swope v. Ward, 185 Mo. 316, 84 S. W. 895.

[38]Norwalk Heating &c. Co. v. Vernam, 75 Conn. 662, 55 Atl. 168, 96 Am. St. 246.

cause to maintain an action for ejectment.[39] The theory here is that the wire, bridge, or structure above the land occupies space which the owner of the land possesses in fee simple, just as much as he does the soil on the surface. By removing the overhead structure the sheriff can deliver the same.

Some confusion in this regard is due to the fact that the election of the owner encroached upon has a bearing on its nature. An intrusion by one lot owner of his foundation wall upon the land of his adjoiner without permission is a trespass, and may be treated as a disseisin in which case the adjoining owner may maintain suit for ejectment; but if the owner of the land so intruded upon extends his own building to his line and rests it upon such wall and occupies the same continuously, he thereby elects to treat the intrusion as a mere trespass and can not maintain ejectment therefor.[40] Ejectment is a remedy for one out of possession, and can not be maintained by one who is in the undisturbed possession of his property.[41]

[§ 400.] (C) **Abatement.**—An encroachment is a private nuisance which the adjoining land owner who is deprived of his rights may remove,[42] but in removing care must be taken to remove no more than actually encroaches and to refrain from causing unnecessary damages.[43] The general rule unquestionably is that land has in its legal significance an indefinite extent upward including everything which is attached to the earth whether by the course of nature, as trees, herbage, or by the hands of man, as houses and other buildings. This rule entitles the owner of the

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[39]Butler v. Frontier Tel. Co., 186 N. Y. 485, 79 N. E. 716.

[40]Rasch v. Noth, 99 Wis. 285, 74 N. W. 820, 67 Am. St. 858, 40 L. R. A. 577.

[41]Zander v. Valentine Blatz Brewing Co., 95 Wis. 162, 70 N. W. 164.

[42]Norwalk Heating &c. Co. v. Vernam, 75 Conn. 662, 55 Atl. 168, 96 Am. St. 246.

[43]Blake v. McCarthy, 115 N. Y. S. 1014.

land to the right to it, and to the exclusive use and enjoyment of all the space above it, and to erect any superstructure thereon that he may see fit, and no one may lawfully obstruct it to his prejudice. Yet if an adjoining owner should build his house so as to overhang it, such an encroachment would not give the legal owner of the land the legal title to that part overhanging. It would be a violation of his right for which the law would afford an adequate remedy, but would not give him ownership or right of possession thereof.[44] This clearly limits the owner's possession to the space above his land and to such structures as rest upon the surface within his boundaries. He has no legal title to structures overhanging but supported by other ground, and in removing the same must return them to their lawful owner. Where an encroachment is slight and made in good faith under a mutual mistake as to the boundary line, there is no right of removal,[45] and if under these circumstances the cost of removal is great, and the corresponding benefit to the adjoining owner is slight, the court will decline to compel removal, and the plaintiff will be left to his remedy at law.[46]

An adjoining owner is not restricted to reliance upon self help nor to the right of action for damages but may invoke the aid of a court of equity to enjoin the maintenance of an encroachment or compel its removal and restoration to original condition as near as possible, although no actual damage is sustained, and although encroachment was made without direct assertion of a right.[47] Relief will not be refused on ground that plaintiff has been guilty of laches,[48] nor is he estopped from compelling removal by permitting

[44]Hoffman v. Armstrong, 48 N. Y. 201, 8 Am. Rep. 537. See § 414, 415, infra.

[45]Goldbacher v. Eggers, 38 Misc. 36, 76 N. Y. S. 881.

[46]Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278.

[47]Norwalk Heating &c. Co. v. Vernam, 75 Conn. 662, 55 Atl. 168, 96 Am. St. 246.

[48]Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. 73, 15 Am. St. 168, 5 L. R. A. 209.

construction to proceed if he is not aware of encroachment.[49] The fact that the removal injured the building of the encroaching owner is irrelevant for one who ousts another from the possession of his property must take all the consequences resulting from the application of the appropriate remedy given by law to restore to the adjoiner that which he has been deprived of.[50]

An owner encroached upon may in addition to other relief or by a separate action recover such damages from the wrongdoer as he may show himself entitled to.[51] The measure of the damages is ordinarily the difference between the value of the property before and after,[52] and where there is doubt of material decrease in value caused by encroachment damages may be allowed on condition that owner encroached upon give a release.[53] Where the encroachment has been abated the plaintiff may acquire any reasonable expense to which he has been put, as for example temporary construction or temporary installation of machinery necessitated by the encroachment,[54] and likewise where the encroachment has materially interfered with the plaintiff's business so as to curtail profits, he may recover same;[55] but where the encroachment is made for the protection of the owner encroached upon, is necessary and entirely to his advantage, and of no benefit to the one making it, (e.g. the shoring of a party wall made necessary by the excavation for a building some twenty (20) feet distant and which makes no use of party wall), and the

[49]Mulrein v. Weisbecker, 37 App. Div. 545, 56 N. Y. S. 240.

[50]Wachstein v. Christoper, 128 Ga. 229, 57 S. E. 511, 11 L. R. A. (N. S.) 917, 119 Am. St 381. See Blake v. McCarthy, 115 N. Y. S. 1014, note 43, supra.

[51]Barnes v. Masterson, 38 App. Div. 612, 56 N. Y. S. 939.

[52]Goldbacher v. Eggers, 38 Misc. 36, 76 N. Y. S. 881.

[53]Crocker v. Manhattan Life Ins. Co., 61 App. Div. 226, 70 N. Y. S. 492.

[54]Barnes v. Berendes, 139 Cal. 32, 72 Pac. 406.

[55]Barnes v. Berendes, 139 Cal. 32, 72 Pac. 406.

owner encroached upon knows it is being done and tacitly consents, he is estopped from even nominal damages.[56]

III. RIGHT TO LATERAL SUPPORT.

[§ 401.] (A) Land in Natural Condition.—At common law an owner is entitled to have his land supported and protected in its natural condition by the land of his adjoiner.[57] This right is not an easement but a natural right of property which passes with title to the soil[58] and is established by statute in some states.[59] It may be lost by grant or reservation affecting the adjacent land which is inconsistent with its continuation.[60] The rule does not apply to made land[61] nor does it extend support to subterranean waters.[62] This qualification is difficult in its application for the removal of the lateral support of the subterranean waters may deprive the adjoining land of its subjacent support, which is within the meaning of lateral support. Thus in Cabot v. Kingman,[63] a divided court held a city liable for damages to land abutting a public street resulting from the withdrawal of quicksand from beneath the surface of the lots by the construction and maintenance of a public sewer, though the sand was removed by pumps from the sewer into which it had fallen by its own weight or had been carried by the percolating water. This decision is followed in Farnandis v. Great Northern R. Co.[64]

[56]Sharpless v. Boldt, 218 Pa. 372, 67 Atl. 652.

[57]Riley v. Continuous Rail Joint Co., 110 App. Div. 787, 97 N. Y. S. 283; Gray v. Tobin, 259 Mass. 113, 156 N. E. 30.

[58]Simon v. Nance, 45 Tex. Civ. App. 480, 100 S. W. 1038. See also Larson v. Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. 439, 445-476.

[59]Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730.

[60]Ryckman v. Gillis, 57 N. Y. 68, 15 Am. Rep. 464.

[61]Fisher v. Green, 1 Phila. (Pa.) 382.

[62]Popplewell v. Hodkinson, L. R. 4 Exch. 248. See also 33 Am. St. 439, 456.

[63]166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45.

[64]41 Wash. 486, 84 Pac. 18, 111 Am. St. 1027, 5 L. R. A. (N. S.) 1086.

where the flow of the ground water is regarded as causing the removal of lateral support.

[§ 402.] **(B) Land with Buildings.—(1) General.**—The right of lateral support pertains only to land in its natural condition and does not extend to buildings thereon which increase the lateral pressure,[65] but the right to lateral support for the soil is not lost where the structure is of such a character as to not materially increase the lateral weight and pressure, as for example a fence,[66] or where it is established that the structure did not contribute to the failure.[67] Thus in Farnandis v. Great Northern R. Co., [68] where it was established that the settlement was due to flow of quicksand and not caused by the weight of the buildings, the defendant engaged in excavating was held liable not only for damage to the land but also that caused to the building.

[§ 403.] **(2) Right Acquired by Grant.**—The right to lateral support for buildings or structures may be acquired by an expressed or implied grant.[69] It is implied "where houses are built in common by the same owner, each needing the support of the other, and a grant of one is made without an express stipulation to the contrary. In such cases the owner is presumed against himself to grant the right of support, and so reciprocally to reserve the right in his own favor. The right is also implied where property consisting of a house and unimproved land is severed by sale,"[70] and the grant of a house will carry with it the right of support for it by the adjoining land of the

[65]Kronberg v. Bulle, 247 Mass. 325, 142 N. E. 61; Bissell v. Ford, 176 Mich. 64, 141 N. W. 860; Steeneck v. O'Leary Realty &c. Co., 80 Misc. 507, 141 N. Y. S. 572.

[66]Rutkoski v. Zalaski, 90 Conn. 108, 96 Atl. 365.

[67]Hanrahan v. Baltimore, 114 Md. 517, 80 Atl. 312.

[68]41 Wash. 486, 84 Pac. 18, 5 L. R. A. (N. S.) 1086, 111 Am. St. 1027.

[69]Bergen v. Morton Amusement Co., 178 App. Div. 400, 165 N. Y. S. 348.

[70]Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581.

grantor.[71] Where two owners have bought from a common grantor, and a wall of the house of one stands wholly upon the land of the other, and is essential to the support of the house, the owner upon whose land it stands having acquired his land subject to the apparent easement, can not remove or impair the wall.[72]

It is well in this connection to distinguish between an implied grant and an implied reservation, for this has an important bearing on the preparation of contracts for sale and deeds. A deed is construed most favorably to the grantee, and an implied grant is therefore easily sustained, but a grantor can not derogate from his own grant, and as a rule he can retain only by express reservation an easement in the land absolutely conveyed.[73] Where the owner of a building and land sells the unimproved land adjoining the building and conveys it by deed without any reservation, there is no implied reservation in favor of the grantor.[74] The courts are rightly hesitant to imply a reservation and do so only where it is supported by a continuous and necessary easement. Where one grants a part of his land, an easement in the land of the grantee is never implied in favor of that retained unless the burden thereof is apparent, continuous and necessary, but a wall supporting a building implies a reservation of lateral support.[75] In this connection to be continuous an easement must be such as may be enjoyed without the intervention of any act on the part of anyone, as for instance an easement for the lateral support of a wall, no actual interference with the servient estate being essential to its enjoyment and a non-continuous easement is where there must be such interven-

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[71]Durante v. Alba, 266 Pa. 444, 109 Atl. 796, 9 A. L. R. 485; Stevenson v. Wallace, 27 Grat. (Va.) 77.

[72]Henry v. Koch, 80 Ky. 391, 44 Am. Rep. 484.

[73]Starrett v. Baudler, 181 Iowa 965, 165 N. W. 216.

[74]Starr v. Standard-Tilton Mill. Co., 183 Ill. App. 454.

[75]Starrett v. Baudler, 181 Iowa 965, 165 N. W. 213.

tion.[76] Necessity as applied to easements means that there be no other reasonable mode of enjoying the dominant tenement without the easement, as for instance lateral support to a wall supporting a building.[77] The argument of this citation is sound, but can hardly be characterized as strong, and it is far safer in preparing a conveyance to express the reservation than to rely upon implication. The right of lateral support acquired by grant is confined to the condition of things at the time of the grant creating it. If therefore increased burdens are afterwards placed thereon as by erecting new buildings or adding to those already erected, and damage to the building is caused by excavations in the adjoining soil, an action is not maintainable for an injury if it would not have occurred except for the increased pressure.[78]

[§ 404.] (3) **Right Not Acquired by Prescription.**—In England twenty years uninterrupted enjoyment of support for improvements which is peaceful, open and without deception gives an easement.[79] The early decisions in the United States recognized this principle,[80] but the present view of the American courts is that it can not be attained by prescription for the enjoyment of easement lacks the elements necessary to make it adverse; that is, the owner seeking lateral support has made no use of his adjoiner's land which can be seen, known, or interrupted, or sued for by the adjoiner.[81]

[§ 405.] (4) **Support from Nonadjacent Land.**—An owner has no right of support from nonadjacent land, but

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[76]Starrett v. Baudler, 181 Iowa 965, 165 N. W. 216.

[77]Starrett v. Baudler, 181 Iowa 965, 165 N. W. 216.

[78]Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581.

[79]Backus v. Smith, 5 Ont. A. 341.

[80]Stimmel v. Brown. 7 Houst. (12 Del.) 219, 30 Atl. 996.

[81]Wigglesworth v. Brodsky, 7 Boyce (30 Del.) 586, 110 Atl. 46; Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730; Starrett v. Baudler, 181 Iowa 965, 165 N. W. 216, L. R. A. 1918B, 528.

the fact that a lot twenty (20) feet in width intervened between excavation and plaintiff's lot does not as a matter of law relieve defendant from liability where he also owned the intervening lot; but the distance of plaintiff's house from the line of the excavation is a matter properly to be considered by the jury in connection with the known ground on the question of negligence,[82] and where an owner has been negligent in excavating on his property he is liable to all injury within the zone of support.[83]

IV. RIGHT TO EXCAVATE.

[§ 406.] **(A) Adjacent Land in Natural Condition.**—A land owner has the entire domain over his land and may excavate to his line,[84] but he must maintain the support for the natural land of his adjoiner and will be liable for damages if he causes it to crumble, sink, or fall away, either directly by its own weight or by the actions of the elements.[85] The actionable wrong is not excavating on one's own property, but in allowing the land of the adjoiner to fall, and the right of action is not based upon negligence but upon the right of lateral support for the land in its natural condition.[86] There must be an appreciable injury, and mere subsidence of soil, slight in extent will not be considered appreciable, and if subsidence is caused by some other agency (as a water pipe freezing) there is no cause for damage,[87] but recovery may be had where through negligence the seepage resulting from the excavation caused the subsidence.[88]

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[82]Witherow v. Tannehill, 194 Pa. 21, 44 Atl. 1088.

[83]Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 Pac. 18, 111 Am. St. 1027, 5 L. R. A. (N. S.) 1086. See also Sharpless v. Boldt, 218 Pa. 372, 67 Atl. 652.

[84]Moore v. Anderson, 5 Boyce (28 Del.) 477, 94 Atl. 771.

[85]Johnston v. Hyre, 83 Kan. 38, 109 Pac. 1075; Kronberg v. Bulle, 247 Mass. 325, 142 N. E. 61.

[86]Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184.

[87]Gates v. Fulkerson, 129 Mo. App. 620, 107 S. W. 1032.

[88]Bissell v. Ford, 176 Mich. 64, 141 N. W. 860.

The true foundation for action for the removal of lateral support of adjacent land in its natural condition is not negligence but the violation of a property right,[89] and it is immaterial whether the excavation is negligently performed or not[90] unless there is an agreement that it be performed in a certain manner.[91] However when damages are sought for injury to improvements which under the common law have no inherent right to lateral support, the owner excavating is liable only in case of negligence.[92]

[§ 407.] (B) Buildings on Adjacent Land.—(1) General.—An owner has the right to excavate on his own land and to the line, although such action may endanger the buildings of his adjoiner, and in absence of negligence, statutory provisions, or contracted or prescriptive right of lateral support he is not liable for damage to such structures and is under no obligation to shore them.[93] The damage for which an excavating owner is liable is limited to that done to the natural soil as if no improvements were erected, and he is not liable at all where the additional pressure of the superstructure caused the failure.[94] Nevertheless it has been held to the contrary where there was no evidence to show that the increased pressure of the buildings caused the failure.[95]

Where the right of lateral support for structures has been acquired, they then stand upon the same footing as natural land, and the excavating owner is liable without

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[89]Knapp v. Siegley, 120 Wash. 478, 208 Pac. 13; Freseman v. Purvis, 51 Pa. Super. 506.

[90]Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184.

[91]Casselberry v. Ames, 13 Mo. App. 575.

[92]Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184.

[93]Steeneck v. O'Leary Realty &c. Co., 80 Misc. 507, 141 N. Y. S. 572.

[94]Hemsworth v. Cushing, 115 Mich. 92, 72 N. W. 1108; Horowitz v. Blay, 193 Mich. 493, 160 N. W. 438.

[95]Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 Pac. 18, 5 L. R. A. (N. S.) 1086, 111 Am. St. 1027.

reference to the question of negligence or want of skill,[96] for if an owner has acquired the right of support to his building he has no duties or liabilities,[97] but such right is not acquired by prescription.[98] The excavator must take reasonable precautions, use ordinary skill, care, and due caution,[99] and what constitutes such depends on the circumstances of each particular case.[1] This duty is enjoined not by any right of support, ex jure naturae, that the owner of the building has in the adjacent land, but by a rule of conduct requiring every owner of property to use it so as not to injure his neighbor,[2] and is not affected by the fact that adjoining building is poorly constructed[3] or encroaches on excavator's land.[4]

[§ 408.] (2) **Interpretations of the Rule.—(a) Ordinary Care and Skill Required.**—Where the right of support of a building is acquired by grant, the excavating owner is not required to use the same care that he would if he were the owner of the adjoiner's building,[5] for beyond taking such care and skill which are not unduly expensive there may be required other precautions which the owner of the building should take to protect the same.[6] What constitutes due care, skill and caution is too indefinite to discuss fully. There is some authority that an excavating owner is under no obligation to remove the earth and build his wall in sections so as to protect his neighbor's

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[96]Kreischer v. Hampton Co., 163 App. Div. 925, 147 N. Y. S. 568.

[97]Bergen v. Morton Amusement Co., 178 App. Div. 400, 165 N. Y. S. 348; Stevenson v. Wallace, 27 Gratt. (Va.) 77.

[98]Bergen v Morton Amusement Co., 178 App. Div. 400, 165 N. Y. S. 348; Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730. See § 404, supra.

[99]United States v. Peachy, 36 Fed. 160.

[1]Moore v. Anderson, 5 Boyce (28 Del.) 477, 94 Atl. 771.

[2]Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087.

[3]Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087.

[4]Moore v. Anderson, 5 Boyce (28 Del.) 477, 94 Atl. 771.

[5]Craig v. Kansas City Term. R. Co., 271 Mo. 516, 197 S. W. 141, Novotny v. Danforth, 9 S. Dak. 301, 68 N. W. 749.

[6]Walker v Strosnider, 67 W. Va. 39, 67 S. E. 1087.

buildings,[7] but in Walker v. Strosnider,[8] it was held that the owner must not only refrain from collateral negligent or wrongful acts, such as unnecessarily heavy blasting, digging out adjacent wall, projecting heavy articles against the wall or building and the like, but must perform the work with reasonable care for the safety of the adjacent building, such as diligence in the construction of his wall after having removed the soil, the removal of the soil and replacement thereof with the wall by sections, if necessary, as a measure of reasonable precaution, or the adoption of other reasonable and practical precautions. In this case the court stressed the point that the excavation and construction of the wall in sections involved but slight additional expense to the excavating owner and relieved the owner of the building of the necessity of costly shoring. Perhaps the most satisfactory consideration of this point is found in Hanrahan v. Baltimore,[9] where the court held that the matter of excavating in sections (in connection with sewer trenches) was a matter of approved methods and not one of due care.

[§ 409.] **(b) Notice Necessary.**—The duty to proceed with due care ordinarily requires that the excavating owner notify his adjoiner, thus affording the latter an opportunity to support his buildings,[10] and in some jurisdictions the statutes require such notice.[11] This rests on the principle "sic utere tuo ut alienum non laedas."[12] Failure to give notice is in itself a lack of due care,[13] and to be suffi-

[7]Obert v. Dunn, 140 Mo. 476, 41 S. W. 901.

[8]67 W. Va. 39, 67 S. E. 1087.

[9]114 Md. 517, 80 Atl. 312, 313.

[10]Wigglesworth v. Brodsky, 7 Boyce (30 Del.) 586, 110 Atl. 46; Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482.

[11]Hannicker v. Lepper, 20 S. Dak. 371, 107 N. W. 202, 6 L. R. A. (N. S.) 243, 129 Am. St. 938; Conboy v. Dickinson, 92 Cal. 600, 28 Pac. 809.

[12]Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087.

[13]Knapp v. Siegley, 120 Wash. 478, 208 Pac. 13; Flanagan Bros. Mfg. Co. v. Levine, 142 Mo. App. 242, 125 S. W. 1172.

cient the notice must be given in time to enable abutter to protect his property.[14] If the owner of the building has actual knowledge of the proposed excavation such as affords him time to protect his building, formal notice is unnecessary.[15] Where the statutes require the giving of notice but do not specify the form, it has been held verbal or written notice is unnecessary if the adjoining owner has actual notice and sufficient warning to enable him to protect his property.[16] The authorities are not in complete agreement in regard to notice, and it has been held that where notice is not required by statute, failure to give same will not render the excavator liable if he otherwise exercises due care and prudence, and that it is a question of fact whether failure to give notice is negligence in any particular case.[17]

Notice or knowledge on the part of the owner of the building does not absolve the adjoining owner from the duty to exercise reasonable care and prudence to avoid injury to the building in improving his own property. The giving of such notice is simply an additional precaution, the omission of which would under certain circumstances amount to negligence.[18] If in the notice it is stated that the excavation is to be made in a certain manner as by sections, and afterwards a change is made in the method, and no notification of this is given, the adjoining excavator is liable for all damages.[19] It is readily seen that in this situation a change of plans might easily result in the necessity of the adjoining owner taking additional precautions in the protection of his building, and failure to give further notification in sufficient time would be negligence.

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[14]Novotny v. Danforth, 9 S. Dak. 301, 68 N. W. 749.

[15]Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087.

[16]Novotny v. Danforth, 9 S. Dak. 301, 68 N. W. 749; Craig v. Kansas City Terminal R. Co., 271 Mo. 516, 197 S. W. 141.

[17]Spohn v. Dives, 174 Pa. 474, 34 Atl. 192.

[18]Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087.

[19]Larson v. Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330, 33 Am St. 439; Cooper v. Altoona Concrete Const. &c. Co., 231 Pa. 557, 80 Atl. 1047.

[§ 410.] **(c) Shoring Not Required.**—At common law an excavator is under no obligation to use more than ordinary care and need not shore or underpin,[20] and if he does so on his own initiative without the adjoiner's request, he can not recover the expense incurred thereby.[21] Nevertheless circumstances may be such that the negligence of the owner of the building authorizes the excavator to do the necessary shoring and underpinning and enables him to charge and collect for the same.[22] The promise to use particular care and caution does not impose the duty to use unusual caution or care, but applies only to the performance of the obligations required by common law.[23]

[§ 411.] **(d) Effect of Statutory Regulation.**—In some states statutes regulate the depth to which excavations may be made (usually eight to ten feet) in cities without restrictions other than those imposed by common law,[24] and beyond the prescribed depth the excavating owner must protect the walls and buildings of his adjoiner at his own expense.[25] The New York statute applies where the excavation is "intended to be or shall be carried below ten feet,"[26] and thus protects the owner of a building where because of the original intentions of the excavator he has depended upon the latter for protection, or where the change to a greater depth renders his precautions inadequate. Under this statute the liability of the excavator going below the prescribed depth is for injury during progress of the work, and subsequent settling due to excavation

[20]Craig v. Kansas City Terminal R. Co., 271 Mo. 516, 197 S. W. 141.

[21]Flanagan Bros. Mfg. Co. v. Levine, 142 Mo. App. 242, 125 S. W. 1172.

[22]Carpenter v. Reliance Realty Co., 103 Mo. App. 480, 77 S. W. 1004.

[23]Cooper v. Altoona Concrete Const. &c. Co., 231 Pa. 557, 80 Atl. 1047.

[24]Foster v. Zampieri, 140 App. Div. 471, 125 N. Y. S. 422; Regan v. Keyes, 204 Mass. 294, 90 N. E. 847.

[25]Hirschberg v. Flusser, 91 N. J. L. 66, 102 Atl. 353; Regan v. Keyes, 204 Mass. 294, 90 N. E. 847.

[26]Rosenstock v. Laue, 67 Misc. 251, 122 N. Y. S. 525.

and building operations irrespective of degree of care used.[27] Under some statutes no obligation to support buildings exists unless the adjoining owner gives the excavator license to enter his premises for the purpose of providing support.[28] The owner of the building need not offer the license on his own initiative, but is only required to grant same when requested,[29] and may grant or refuse such license but can not impose conditions and other liabilities such as protection to pipes from freezing. The excavator is giving a service of value only to the owner of the building and can not be penalized.[30] Without a license, entry is a trespass, but when once given and excavator has entered and started his work, the license is irrevocable.[31] It has been held that a request for license to enter adjoining premises implies an intention to carry the excavation more than ten feet, and that the excavator is estopped from denying such intention although plans previously filed are for less, for the adjoining owner is not expected to search the records to ascertain his neighbor's intention. The opinion, however, was not unanimous, and the dissenting judge called attention that the request was made to enable excavator to protect his workmen and with this in mind constituted no implication contradictory to the plans.[32]

Where excavator is not required by statute to protect the adjoining building, the owner must protect the same, and failure on his part to do so does not make the excavator liable, provided he use reasonable and ordinary care;[33] but where a change from a safe to a dangerous mode of excavation is made without notice, the excavator is liable,[34]

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[27]Bloomingdale v. Duffy, 71 Misc. 136, 127 N. Y. S. 1080.

[28]Foster v. Zampieri, 140 App. Div. 471, 125 N. Y. S. 422.

[29]Cohen v. Simmons, 66 Hun 634, 21 N. Y. S. 385.

[30]Korn v. Weir, 88 N. Y. S. 976.

[31]Ketchum v. Newman, 116 N. Y. 422, 22 N. E. 1052.

[32]Blanchard v. Savarese, 97 App. Div. 58, 89 N. Y. S. 664, cited in Foster v. Zampieri, 140 App. Div. 471, 125 N. Y. S. 422.

[33]Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087.

[34]Larson v. Metropolitan St. R. Co., 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. 439.

or where the soil is unstable the excavator may be required to use particular methods to insure due care and caution.[35] When the excavator gives notice the duty of protecting the building is on the owner,[36] but the latter is not liable for injuries to the building due to negligence of the excavator.[37]

V. LIABILITY FOR DANGEROUS CONDITIONS.

[§ 412.] An owner whose premises are in a dangerous condition because of fire, flood, or other cause is liable to all damage to adjoining owner due to his failure to use ordinary care and caution and to repair the same,[38] but he must be allowed a reasonable time to investigate and to make repairs.[39] When the adjoining owner notifies his neighbor of the existing condition his duty ceases. He has the right to presume that his neighbor will perform his duties in regard to the making of repairs, and he is not guilty of contributory negligence,[40] if he is damaged. Although it has been held that an owner is not liable for damage due to the blowing over of a sound tree standing upon his land,[41] he is responsible if the tree is decayed and in a dangerous condition.[42] In general the American courts base liability on negligence,[43] and an owner in impounding water, or storing explosives upon his land is obligated to provide a reservoir or arsenal and to maintain the same in safe condition. He is responsible for all contingent damages as may be reasonably anticipated and are due to his negligence.[44] The courts so hold even though the thing kept

[35]Gildersleeve v Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46.

[36]Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482.

[37]Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N. E. 296.

[38]Teeper v. Taylor, 141 Mo. App. 282, 124 S. W. 1062.

[39]Mahoney v. Libbey, 123 Mass. 20, 25 Am. Rep. 6.

[40]Beidler v. King, 209 Ill. 302, 70 N. E. 763, 101 Am. St. 246.

[41]Sheldon v. Sherman, 42 N. Y. 484, 1 Am. Rep. 569.

[42]Gibson v. Denton, 4 App. Div. 198, 38 N. Y. S. 554.

[43]Fitzpatrick v. Penfield, 267 Pa. 564, 109 Atl. 653.

[44]Everett v. Hydraulic Flume Tunnel Co., 23 Cal. 225; Hoffman v. Tuolumne County Water Co., 10 Cal. 413.

on the premises is not in itself dangerous, but negligence is used in maintaining it. Thus where bricks were negligently piled so that water ran into a neighbor's cellar, the owner was liable.[45] Furthermore where the element of danger exists the owner must take precautions, and if negligent in this regard, he is liable.[46] An owner is liable for allowing things in themselves offensive, such as filthy water,[47] snow,[48] or lumber to go on a neighbor's property, or for causing by artificial means things in themselves inoffensive to pass upon his neighbor's land so as to substantially interfere with the neighbor's property rights or to cause him injury, and the fact that an act of nature such as the freezing of water renders the substance offensive, is immaterial.[49]

VI. RIGHT TO LIGHT AND AIR.

[§ 413.] In the United States the doctrine of ancient lights does not prevail,[50] and a conveyance does not imply the right of light and air from over the land reserved by the grantor, and such an implied grant will be sustained only in cases where actual necessity exists to vest a dominant tenement with such light, and will be denied or rejected in cases when it appears that the owner claiming it can, at a reasonable cost, have or can substitute other lights to his buildings. No implication of a grant to light and air arises upon the sale of one of two adjacent lots having a house upon it with windows overlooking the land of the grantor, and the grantor, by such sale is not estopped from improving his retained lot by building upon it, though his erection darkens the windows of his grantee and excludes

[45]Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 45 N. E. 668, 49 N. E. 296.

[46]Gibson v. Denton, 4 App. Div. 198, 38 N. Y. S. 554.

[47]Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56.

[48]Bishop v. Readsboro Chain Mfg. Co., 85 Vt. 141, 81 Atl. 454, 36 L. R. A. (N. S.) 1171, Ann. Cas. 1914B, 1163.

[49]Chicago &c. R. Co. v. Hoag, 90 Ill. 339.

[50]Morris v. Roberson, 137 Ky. 841, 127 S. W. 481.

the access of light and air.[51] An expressed grant of a private way carries with it no implied grant of a right to have light and air pass over the way to any greater extent than is necessary for the reasonable enjoyment of the right of passage.[52] Where a grantor owned the adjacent land beneath the window in the side of a building which was the sole source of light and air for a room, and it was a physical impossibility to obtain light and air otherwise, the courts held that the grantee purchasing the building had an implied easement,[53] but it is only extreme conditions which will support such an implication, and the necessity must be most evident[54] for the courts are hesitant to imply an easement in favor of the grantee.[55] The right to light and air does not include the right to a view.[56] A property owner has the right to open windows in a wall on his line, but he thereby acquires no easement in his neighbor's land.[57] The use of light and air from over his neighbor's property does not have the essential element necessary to make it adverse.[58]

VII. TREES.

[§ 414.] (A) Near the Line.—A tree standing near a boundary so that its roots and branches extend over the boundary is the property of the owner of the land on which the trunk stands.[59] The tree and its produce is the sole property of him on whose land it is situated as determined by the position of the trunk, and the adjoining owner pick-

[51]Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

[52]Bitello v. Lipson, 80 Conn. 497, 69 Atl. 21, 16 L. R. A. (N. S.) 193, 125 Am. St. 126.

[53]Bloom v. Koch, 63 N. J. Eq. 10, 50 Atl. 621.

[54]Bringhurst v. O'Donnell, 14 Del. Ch. 225, 124 Atl. 795; In re Rennyson's Appeal, 94 Pa. 147, 39 Am. Rep. 777.

[55]Haas v. Brannon, 99 Okla. 94, 225 Pac. 931.

[56]Stroup v. Rauschelbach, 217 Mo. App. 236, 261 S. W. 346; Brown v. Greenfield Congregational Soc., 197 Fed. 238.

[57]Christ Church v. Lavezzelo, 156 Mass. 89, 30 N. E. 471.

[58]See § 338, supra.

[59]Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645; Philbin v. Marlborough Elec. Co., 218 Mass., 394, 105 N. E. 893.

ing, carrying away, and converting to his own use the fruit thereof is liable in action,[60] and if he prevents by force and violence the rightful owner from standing on his own land and gathering the same he is guilty of assault.[61] Trees whose branches overhang are not nuisances except to the extent that the branches overhang, and although an adjoiner can not destroy a tree on the lot of another regardless of the fact that it may inconvenience him,[62] nevertheless he may remove the branches that overhang and the roots which intrude across his line,[63] or seek damages for abatement;[64] and if the tree is noxious he may recover from the owner for any injury sustained.[65] Where the roots of trees near the boundary injure the crops on the adjacent land, the owner of the latter is entitled to a judgment requiring the owner of the trees to abate such nuisance, and is not restricted to an action to at law for damages, as the injury is of a continuing and increasing nature.[66]

[§ 415.] **(B) On the Line.**—If the trunk of a tree is on the boundary line, the tree is the common property of both owners whether marked as a boundary or not.[67] A shade tree standing on a boundary between adjoining owners is common property of both, and the mere fact that it stands on border of sidewalk affording shade for pedestrian does not interfere with right of either to protect it or recover damages for its destruction.[68] "Each of the owners upon whose land any part of a trunk of a tree stands, has an interest in that tree, a property in it, equal in the first

[60]Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645.

[61]Hoffman v. Armstrong, 48 N. Y. 201, 8 Am. Rep. 537.

[62]Commonwealth v. Blaisdell, 107 Mass 234.

[63]Hickey v. Michigan Cent. R. Co., 96 Mich. 498, 55 N. W. 989, 21 L. R. A. 729, 35 Am St. 621.

[64]Philbin v. Marlborough Elec. Co., 218 Mass. 394, 105 N. E. 893; Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623.

[65]Buckingham v. Elliott, 62 Mass. 296, 52 Am. Rep. 188.

[66]Shevlin v. Johnston, 56 Cal. App. 563, 205 Pac. 1087.

[67]Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

[68]Blalock v. Atwood, 154 Ky. 394, 157 S. W. 694, 46 L. R. A. (N. S.) 3.

instance, to, or perhaps rather identical with, the part which is upon his land; and, in the next place, embracing the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole."[69] As such trees are the common property of both, neither may destroy without the consent of the other,[70] and where a row of trees is on the line neither is entitled to make his own partition by cutting alternate trees,[71] and furthermore an injunction may be granted to prevent the destruction of a line tree.[72] However the mere fact that a tree stands upon a boundary does not preclude either owner from cutting away the branches overhanging his land.[73]

VIII. FENCES.

[§ 416.] **(A) Definition.**—A fence is a visible or tangible obstruction which may be a hedge, ditch, wall, or frame of wood, or any line of obstacles interposed between two properties of land so as to part off and shut in the land and set it off as private property,[74] and intended to prevent intrusion from without or straying from within, and a gate, which is a contrivance for passing through a fence, may of necessity be an essential part of the enclosing structure, and is therefore a part of the fence.[75]

[§ 417.] **(B) Sufficiency.—(1) Common Law.**—At common law fences are always good enough when they answer their purpose of keeping ones own cattle enclosed, and always insufficient if they fail of that purpose,[76] and any

[69]Scarborough v. Woodill, 7 Cal. App. 39, 93 Pac. 383, citing Fenn, J., Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582 (ubi supra).

[70]Harndon v. Stultz, 124 Iowa 440, 100 N. W. 329.

[71]Scarborough v. Woodill, 7 Cal. App. 39, 93 Pac. 383.

[72]Scarborough v. Woodill, 7 Cal. App. 39, 93 Pac. 383.

[73]Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

[74]Kimball v. Carter, 95 Va. 77, 27 S. E. 823, 38 L. R. A. 570.

[75]Dibblee v. Astoria &c. R. Co., 57 Ore. 428, 111 Pac. 242.

[76]Jackson v. Rutland &c. R. Co., 25 Vt. 150, 60 Am. Dec. 246.

fence which prevents horses, mules, and other stock not more than ordinarily addicted to mischief from breaking into fields under cultivation is sufficient.[77] Furthermore to be sufficient it need not be constructed of any particular materials or be attractive in appearance.[78]

[§ 418.] (2) **Statutory Provisions.**—Sufficiency may be described by statutes,[79] and such a statute fixing the kind of a fence has been construed to prescribe the type which would enable land owners to enforce certain remedies against the owners of trespassing animals and not to prohibit any other kind of a fence,[80] or make them unlawful, nor do they prevent an owner from recovering damages in a regular suit where he has a fence sufficient to exclude ordinary stock, even though not built in strict compliance with the statutes.[81] When a general law prescribes what shall be deemed a sufficient fence, a special statute and by parity of reasoning an agreement requiring a "sufficient fence" without a more particular description will be held to refer to and adopt the standard prescribed by such a general law,[82] but statutory requirements regarding sufficiency may be waived or modified by agreement or acquiescence in the existence of a fence which does not come up to statutory requirements.[83] Fences which meet the specifications of the statute are known as lawful fences,[84] but these by deterioration and settling may become ordinary or common fences.[85] Lawful and sufficient are not synonomous terms, and it has been held that "sufficient fences" which a person must maintain around his premises or fields to entitle him

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[77]State v. Lamb, 30 N. Car. 229.

[78]Giller v. West, 162 Ind. 17, 69 N. E. 548.

[79]Kobayashi v. Strangeway, 64 Wash. 36, 116 Pac. 461.

[80]Worthington v. Wade, 82 Tex. 26, 17 S. W. 520.

[81]Finley v. Bradley (Tex. Civ. App.), 21 S. W. 609.

[82]Albright v. Bruner, 14 Ill. App. 319.

[83]Scott v. Jackson, 93 Ill. App. 529.

[84]Russell v. Hannibal &c. R. Co., 83 Mo. 507.

[85]Smith v. Chicago &c. R. Co., 127 Mo. App. 160, 105 S. W. 10.

to recover for a trespass thereon, do not necessarily mean lawful fences, but rather such as farmers of practical knowledge and experience would consider as sufficient to protect the crop from injury by usually orderly cattle.[86]

[§ 419.] (C) Partition Fences.—(1) Rights and Duties of Owners.—Subject to his common law duty to keep his domestic animals off the land of other persons, and to statutory provisions regulating fencing, an owner of land has all the rights and benefits of ownership among which must be the right to have his land fenced or unfenced at his pleasure,[87] and where a fence is necessary for the enjoyment of an easement, such as a right of way to a pasture, the owner of the easement has the right to construct a fence so as to enable him to enjoy the easement.[88] No man is required in the absence of an agreement, prescription, or a statute to the contrary to fence against the cattle of others,[89] except when the same are being driven (not grazing) along a highway.[90] However the common law rule is not recognized in all jurisdictions, and in many states the owners of cattle are under no obligation to keep them from going upon the unenclosed lands of others, and to have a remedy for trespass owner must have his land enclosed with a sufficient fence.[91]

The duty to maintain a fence may arise from local custom,[92] and when for a period of over twenty years the owner of one of two adjoining lands has continuously without interruption and as a duty repaired the whole of a division fence between them, a presumption arises that he and those holding under whom he derived title were as owners of a

[86]Robison v. Fetterman (Pa.), 14 Atl. 245.

[87]Burr v. Hamer, 12 Nebr. 483, 11 N. W. 741.

[88]Murray v. Dickson, 57 Tex. Civ. App. 620, 123 S. W. 179.

[89]Holladay v. Marsh, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678; Laurence v. Coombs, 37 N. H. 331, 72 Am. Dec. 332.

[90]Hartford v. Brady, 114 Mass. 466, 19 Am. Rep. 377.

[91]12 Am. & Eng. Enc. of Law 1041.

[92]Knox v. Artman, 3 Rich. L. (S. Car.) 283.

servient tenement, bound to perpetually make and maintain the fence, the existence of a former and lost agreement to do so being inferred.[93] Owners may make valid agreements as to the construction and maintenance of partition fences even where the subject is regulated by statute,[94] and such agreements carry by implication the right to do such things as are necessary to build the fence.[95] An agreement to maintain a portion of a fence may arise by implication,[96] but mere silence during erection although with knowledge will not imply an agreement.[97] Agreements such as to repair a division fence may follow the land into the hands of subsequent purchasers,[98] especially where the language indicates that such is the intention,[99] and the statutory requirement that agreement be recorded is for the purpose of giving notice of such an agreement. As parties to an unrecorded agreement have notice thereof, between them such an agreement is effectual,[1] but an oral agreement between adjoining owners is not a covenant running with the land so as to bind subsequent purchasers without notice.[2]

In nearly all jurisdictions statutes regulate duties pertaining to the fencing of land, and these have been held to be a valid exercise of police power.[3] They impose greater obligations than the common law and usually require that a proprietor seeking damages from the owner of intruding cattle have his cultivated fields protected by a substantial fence. In general, duty to maintain usually applies to

[93]Titus v. Pennsylvania R. Co., 87 N. J. L. 157, 92 Atl. 944.

[94]Lowe v. Guard, 11 Ind. App. 472, 39 N. E. 428, 54 Am. St. 511.

[95]Newberry v. Bunda, 137 Mich. 69, 100 N. W. 277.

[96]Millner v. Elias, 101 Conn. 280, 125 Atl. 470; Schnare v. Gehman, 9 Iowa 283.

[97]Cheseboro v. Lockwood, 88 Conn. 219, 91 Atl. 188.

[98]Dey v. Prentice, 90 Hun 27, 35 N. Y. S. 563, 70 N. Y. St. 224.

[99]Sexaure v. Wilson, 136 Iowa 357, 113 N. W. 941, 14 L. R. A. (N. S.) 185.

[1]Little v. Laubach, 183 Iowa 1370, 168 N. W. 155.

[2]Millner v. Elias, 101 Conn. 280, 125 Atl. 470; Hull v. Breedlove (Ind. App.); 165 N. E. 328.

[3]Tomlinson v. Bainaka, 163 Ind. 112, 70 N. E. 155.

improved, enclosed, or agricultural lands,[4] although in some instances they pertain also to town and city property.[5] These statutes define a sufficient fence, require adjacent land owners to share in the expense, provide for the appointment of fence viewers who adjust the cost and maintenance or proportion the fence between adjoining owners for construction and repair,[6] and may prescribe the materials and method of construction.[7] Where a fence is apportioned for maintenance each owner is responsible for damages arising from negligence in keeping his section in repair, but where the adjoining proprietors are jointly responsible, neither can have damages against his neighbor for an insufficient fence, for until there has been a division of duty responsibility rests equally on both.[8] Where a landowner fails to maintain a partition fence, his adjoiner may make repairs under the supervision of fence viewers and recover the costs as duly proportioned by them,[9] and these costs become a lien on the land of the owner who is in default.[10] These statutes do not impose an absolute duty to build and maintain fences, and parties may dispense with a fence if they so agree. Such an agreement, is, in some regards, but not all, the equivalent of a fence;[11] and when the statutory provisions are waived the parties are left to their common law rights and remedies, the statutes having no application.[12]

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[4]Lantis v. Reithmiller, 95 Mich. 45, 54 N. W. 713.

[5]Grief v. Kahn, 87 Ky. 17, 7 S. W. 159. Contrary, Detroit v. Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

[6]Griffith v. Carrothers, 86 Kans. 93, 119 Pac. 548.

[7]Quigley v. Clough, 173 Mass. 429, 53 N. E. 884, 45 L. R. A. 500, 73 Am. St. 303.

[8]De Mers v. Rohan, 126 Iowa 488, 102 N. W. 413.

[9]Myers v. Dodd, 9 Ind. 290, 68 Am. Dec. 624.

[10]Tomlinson v. Bainaka, 163 Ind. 112, 70 N. E. 155.

[11]Winters v. Jacobs, 29 Iowa 115.

[12]Tomlinson v. Bainaka, 163 Ind. 112, 70 N. E. 155; Myers v. Dodd, 9 Ind. 290, 68 Am. Dec. 624.

[§ 420.] (2) **Location.**—Statutes regulating partition fences contemplate fences on the boundary line,[13] and to constitute a partition fence the structure must be substantially so placed.[14] It is not essential that it be exactly on the dividing line,[15] and a fence upon a line agreed upon by adjoining owners will be regarded as a partition fence.[16] Where a fence dividing two properties is supposed by both owners to be on the line, such a fence is a division fence as between them until the true line is established, at which time the fence must be made to conform to the true line.[17] A fence not on the dividing line may become a partition fence by acquiescence in its location over a long period of time,[18] and continued consideration of a fence as being on the line will render the fact that it is not, immaterial.[19] Where a fence not upon the true line is rebuilt, it must be correctly located.[20] As the line between adjacent owners is mathematical, and as such has no width, and every fence takes some land, a reasonable amount of land may be used, taken one-half from each of the adjoiners,[21] for each of the coterminous owners must contribute his share of land, material and labor for the erection and maintenance of division fences.[22] The land taken must be a reasonable quantity as determined by a just regard to the proper accomplishment of the purpose which both parties have in view, and in which they have a common interest,[23] and great regard should be had to the usage and practice of men of ordinary skill in building fences on their own lands

[13]Rose v. Linderman, 147 Mich. 372, 110 N. W. 939.

[14]Sturgill v. Sturgill, 180 Ky. 170, 202 S. W. 311.

[15]Card v. Dale, 67 Iowa 552, 25 N. W. 774.

[16]Hoar v. Hennessey, 29 Mont. 253, 74 Pac. 452.

[17]Schmuck v. Beck, 72 Mont. 606, 234 Pac. 477.

[18]Grief v. Kahn, 87 Ky. 17, 7 S. W. 159. See § 321.

[19]Garrett v. Sewell, 95 Ala. 456, 10 So. 226.

[20]Scott v. Jackson, 93 Ill. App. 529.

[21]Hoar v. Hennessey, 29 Mont. 253, 74 Pac. 452.

[22]Schmuck v. Beck, 72 Mont. 606, 234 Pac. 477.

[23]Hoar v. Hennessey, 29 Mont. 253, 74 Pac. 452.

in similar kinds of soil and for like purposes.[24] Local conditions and the purpose govern the reasonableness of the quantity of land taken for fences, and what is reasonable in one case may not be so in another.[25] The burden is on the adjoiner to show that a division fence built partly on his land by his neighbor is unreasonable for the purpose intended.[26] If more than one-half of partition fence is built upon land of adjacent owner without his consent, he is entitled to relief,[27] and it has been held that a fence constructed with posts set with their centers on the line and the netting entirely on one side did not rest equally on the adjacent properties.[28] The occupation of a landowner of the requisite land of his neighbor for the erection of a fence is not adverse, but permissive.[29] The rules regarding the location of partition fences do not apply to fences at the front corner of adjacent properties, and such fences along the street line must terminate at the division line.[30]

[§ 421.] (3) **Ownership.**—A fence entirely on the land of one person, and which is not a partition fence by agreement, prescription, or statute, belongs to the owner of the land on which it rests,[31] and this is true even though it may be erected by another,[32] unless the latter acted in good faith under misapprehension of the line, and with the expressed or implied consent of the owner,[33] or the case comes within a statute protecting a person who builds a fence on land of another prior to establishment of the line by a surveyor,

[24]Newell v. Hill, 2 Metc. (43 Mass.) 180.

[25]Hoar v. Hennessey, 29 Mont. 253, 74 Pac. 452.

[26]Hoar v. Hennessey, 29 Mont. 253, 74 Pac. 452.

[27]Rose v. Linderman, 147 Mich. 372, 110 N. W. 939; Higgins v. Kingsley, 82 Hun 150, 31 N. Y. S. 100, 63 N. Y. St. 391.

[28]Higgins v. Kingsley, 82 Hun 150, 31 N. Y. S. 100, 63 N. Y. St. 391.

[29]Dysart v. Leeds, 2 Pa. 488.

[30]Hubbell v. Peck, 15 Conn. 133.

[31]Quillen v. Betts, 1 Penn. (Del.) 53, 39 Atl. 595.

[32]Kimball v. Adams, 52 Wis. 554, 9 N. W. 170.

[33]Ousley v. Lambeth (Mo. App.), 199 S. W. 594.

in which case the builder retains possession of the fence provided he moves it.[34] Thus where one adjoining owner erects the whole of a division fence with knowledge of the other owner, but by mistake erects on land of such other, he may on discovery remove such fence without subjecting himself to action for trespass or material;[35] but where, under agreement for its removal, a fence is placed on the land of another, and the land upon which it rests is sold to an innocent purchaser without knowledge or notice of such agreement by the original parties, such fence is not removable as against such innocent purchaser.[36]

A fence on the dividing line between two adjacent properties, or on the line recognized by the abutting owners as such, although not so in part, is owned by them as tenants in common.[37] The assumption is that adjoining landowners hold a fence as tenants in common,[38] and the statutes in some states make partition fences the joint property of the adjoiners.[39] However a partition fence on the dividing line may belong entirely to one where it has been built by him and his adjoiner has not reimbursed him either voluntarily or under statutory compulsion.[40]

[§ 422.] **(D) Removal and Destruction.—(1) Civil Liability.**—A person who commits a trespass by removing and destroying a fence becomes liable to an action for damages,[41] and the fact that the fence is not as prescribed by statute will not defeat action for wilful destruction.[42] Furthermore the fact that the entry is legal is no defense where the fence is not repaired.[43] An owner has the right

[34]Scholl v. Kinitzer, 83 Wis. 307, 53 N. W. 451.

[35]Schmuck v. Beck, 72 Mont. 606, 234 Pac. 477.

[36]Schmuck v. Beck, 72 Mont. 606, 234 Pac. 477.

[37]Garrett v. Sewell, 95 Ala. 456, 10 So. 226. See Party Walls, 426.

[38]Sayles v. Bemis, 57 Wis. 315, 15 N. W. 432.

[39]Walker v. Watrous, 8 Ala. 493, 42 Am. Dec. 646.

[40]Jones v. Derosset (Mo. App.), 185 S. W. 239.

[41]Robinson v. Schiltz, 135 Mo. App. 32, 115 S. W. 472.

[42]Norton v. Young, 6 Colo. App. 187, 40 Pac. 156.

[43]Crawford v. Maxwell, 3 Humph. (22 Tenn.) 476.

to remove a fence which is entirely on his land, and which is not a partition fence by agreement, prescription, or statute,[44] but a partition fence substantially on the line is the property of both owners, and either may repair it and make lawful entry upon the land of the other for that purpose,[45] but neither may remove it,[46] and if he does so he is liable to the adjoiner,[47] unless it is with the consent or on notice to the other party and for the purpose of replacing it.[48] When more than one-half is built on the land of one owner, he may remove excess even though it becomes necessary to destroy the entire fence to do so,[49] but the fact that the boundary is in dispute does not justify owner in removing division fence.[50] Under certain circumstances such as erection by one owner along a temporary line with the understanding that it is to be moved when the correct line is ascertained, a fence built over the line may be removed by the builder.[51] Furthermore when a fence is built by one party along an agreed line and with the consent of the adjoining owner, the same belongs to the builder, without reference to the true boundary, and the adjoiner, in tearing down the fence, is guilty of the wilful and malicious destruction of the property of another.[52]

[§ 423.] (2) **Criminal Liability.**—Criminal liability for the destruction and removal of fences is dependent upon the terms of the particular statutes of the various jurisdictions,[53] and in general the act must be unlawful and wil-

[44]White v. Thompson, 187 Ky. 480, 219 S. W. 434, 8 A. L. R. 1641.

[45]Walker v. Watrous, 8 Ala. 493, 42 Am. Dec. 646.

[46]Vincent v. Mustain, 187 Ky. 843, 220 S. W. 1070.

[47]Gilreath v. State, 96 Ga. 303, 22 S. E. 907.

[48]White v. Thompson, 187 Ky. 480, 219 S. W. 434, 8 A. L. R. 1641.

[49]Sparhawk v. Twitchell, 1 Allen (83 Mass.) 450.

[50]Jones v. Motley, 11 Ky. L. 921, 13 S. W. 432.

[51]Curtis v. Leasia, 78 Mich. 480, 44 N. W. 500. See section 420.

[52]State v. Buck, 74 Vt. 29, 51 Atl. 1087.

[53]McNeely v. State, 50 Tex. Cr. 279, 96 S. W. 1083.

ful,[54] and if purpose is legitimate and no harm is done, no offense is committed,[55] but where the statute prohibits voluntarily throwing down a fence, malice or wilfulness is not essential,[56] and where the act is under belief of authority there is no criminal liability.[57] In most jurisdictions there is no criminal liability where a person acts under a bona fide claim of right,[58] but mere unsupported claim of ownership is not conclusive evidence of good faith,[59] and where one's belief in his right is due to negligence in ascertaining the facts of ownership, he is criminally liable.[60]

The act of tearing down a fence on premises held by another as a step towards taking forcible possession is unlawful, regardless of whether doer has any title capable of being established in a civil suit, for the courts are created to settle such differences.[61] This rule is contemporaneous with the Decalog and was laid down by Moses as follows: "Thou shalt not remove thy neighbor's landmark, which they of old time have set."[62] One can not be convicted for preventing the removal and relocation of a fence where right of removal is doubtful, and the dividing line uncertain.[63] Under some statutes there is no criminal liability unless the fence embraces an enclosure,[64] but this qualification is not universal[65] and while some statutes apply only to the destruction of fences embracing cultivated fields,[66]

[54]State v. McCracken, 118 N. Car. 1240, 24 S. E. 530.

[55]Camp v. State, 49 Tex. Cr. 396, 92 S. W. 845.

[56]State v. Adams, 91 Kans. 642, 138 Pac. 580.

[57]State v. McCracken, 118 N. Car. 1240, 24 S. E. 530.

[58]Giddings v. State, 50 Tex. Cr. 333, 96 S. W. 926.

[59]Woods v. State, 10 Ga. App. 476, 73 S. E. 608.

[60]Clark v. State, 50 Ark. 570, 9 S. W. 431.

[61]Johns v. State, 76 Tex. Cr. 303, 174 S. W. 610.

[62]Deuteronomy 19:14.

[63]Boyd v. State, 28 Tex. App. 524, 13 S. W. 864.

[64]Wilson v. Burton, 96 Mo. App. 686, 70 S. W. 916.

[65]Shaw v. State, 125 Ala. 80, 28 So. 390.

[66]State v. Campbell, 133 N. Car. 640, 45 S. E. 344.

others apply to those enclosing any lands.[67] In general the fact that the fence is not a lawful one is immaterial.[68]

[§ 424.] (E) Spite Fences.—(1) Legality. — The weight of authority maintains that in absence of statute the erection of any fence or wall is lawful regardless of the cutting off of light, air, and view, and the fact that it was built with malicious intent does not affect the same.[69] This is unquestionably sound where the fence or wall has some useful purpose.[70] In the absence of a contract or deed protecting an owner he is not assured of privacy,[71] and to attain the same the proper method is to erect a screen of his own. The conclusion regarding the effect of malice is based on a misapplication of the sound principle that as long as an owner's action is in harmony with his legal rights of property, the world has no right to question his morals, and to conclude that his lawful actions are inspired by malice. In general "a man is free to direct his moral conduct as he pleases in so far as he is not restrained by statute,"[72] but while it is true that when one pursues a strictly legal course his motives are immaterial, yet no man has the right to build and maintain an entirely useless structure for the sole purpose of injuring his neighbor. The common law does not permit a man to be deprived of water, air, or light for the mere gratification of malice,

[67]Dennis v. State, 43 Tex. Cr. 464, 66 S. W. 838.

[68]Hill v. State, 104 Ala. 64, 16 So. 114.

[69]Falloon v. Schilling, 29 Kans. 292, 44 Am. Rep. 642; Saddler v. Alexander, 21 Ky. L. 1835, 56 S. W. 518; Lord v. Langdon, 91 Maine 221, 39 Atl. 552; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. 560; Bordeaux v. Greene, 22 Mont. 254, 56 Pac. 218, 74 Am. St. 600; Stroup v. Rauschelbach, 217 Mo. App. 236, 261 S. W. 346; Adler v. Parr, 34 Misc. 482, 70 N. Y. S. 255; Pickard v. Collins, 23 Barb. 444; Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; Dallas Land & Loan Co. v. Garrett (Tex. Civ. App.), 276 S. W. 471; Metzger v. Hochrein, 107 Wis. 267, 183 N. W. 308, 50 L. R. A. 305, 81 Am. St. 841.

[70]Daniel v. Burmingham Dental Mfg. Co., 207 Ala. 659, 93 So. 652.

[71]Christ Church v. Lavezzolo, 156 Mass. 89, 30 N. E. 471.

[72]Burke, J., Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177.

and to hold otherwise would make the law a convenient engine to injure and destroy the peace and comfort, and to damage the property of one's neighbor.[73] Where the fence has no useful purposes, actions speak louder than intention, and malice as a motive is not a conclusion but an evident fact, and it is clearly a question for the jury to decide whether or not under the particular circumstances a fence serves a useful purpose. In a few jurisdictions spite fences are held nuisances, and as constituting a cause for action, when built with malice.[74]

The New Jersey courts have so held where the fence served an obvious useful purpose, and the evidence of malice was based entirely on the type of fence, which was erected to prevent the throwing of refuse on the builder's lot from the windows of an adjacent house. The court held that the owner was not justified in erecting a "barrier of close boards" in front of the windows when a barrier of another kind would have been just as effective. However it should be considered that the court further ruled that the adjoiner had an implied easement to light and air, and due consideration of this conclusion lessens the force of ruling in regard to the fence.[75]

[§ 425.] (2) **Statutory Regulations.**—In some states the statutes declare fences and like structures a private nuisance if they exceed a certain prescribed height and are unnecessarily and maliciously maintained for spiteful pur-

[73]Burke v. Smith, 69 Mich. 380, 37 N. W. 838. see also Bush v. Mockett, 95 Nebr. 552, 145 N. W. 1001, 52 L. R. A. (N. S.) 736; Guest v. Reynold, 68 Ill. 478, 18 Am. Rep. 570; Giller v. West, 162 Ind. 17, 69 N. E. 548.

[74]See Norton v. Randolph, 176 Ala. 381, 58 So. 283, 40 L. R. A. (N. S.) 129; Wilson v. Irwin, 144 Ky. 311, 138 S. W. 373, 42 L. R. A. (N. S.) 722; Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. 510; Bush v. Mockett, 95 Nebr. 552, 145 N. W. 1001, 52 L. R. A. (N. S.) 736; Bloom v. Koch, 63 N. J. Eq. 10, 50 Atl. 621; Saperstein v. Berman, 119 Misc. 205, 195 N. Y. S. 1; Barger v. Barringer, 151 N. Car. 433, 66 S. E. 439; Hibbard v. Halliday, 58 Okla. 244, 158 Pac. 1158, L. R. A. 1916F, 903.

[75]Bloom v. Koch, 63 N. J. Eq. 10, 50 Atl. 621. See also § 413.

poses.[76] The controlling motive must be malice[77] but it need not be the sole motive, and it is sufficient if malice predominates.[78] Whether or not malice is the activating motive may be inferred from the situation,[79] and where a structure strikes an ordinary beholder as manifestly erected with the leading purpose of annoying the adjoining owner, the predominant intention of malice is established by the circumstances,[80] and it is immaterial that retaliation inspired the malice, for in a well ordered state no one is allowed to retaliate.[81] The fact that light and air are obstructed will not in itself enjoin the maintenance of a spite fence,[82] and the statute does not apply to a fence in the main nine to eleven feet from the line, although maliciously erected.[83] Such a situation suggests anything but malice, for it appears that the owner erecting the fence sought to maintain his privacy in a neighborly and gentlemanly way, and to attain his end without cutting off the light and air he practically gave his neighbor the partial use of eleven feet. A building which enhances the value of a property is not a nuisance although it may cut off light and air, and the motives of the builder can not be assigned as a legal reason for preventing its construction.[84]

IX. PARTY WALLS.

[§ 426.] **(A) Definition and Nature of Ownership.**— A party wall has been defined broadly as a wall between two adjoining estates which is used for the common benefit

[76]Bar Due v. Cox, 47 Cal. App. 713, 190 Pac. 1056; Saperstein v. Berman, 119 Misc. 205, 195 N. Y. S. 1; Lord v. Langdon, 91 Maine 221, 39 Atl. 552; Horan v. Byrnes, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. 670.

[77]Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

[78]Healey v. Spaulding, 104 Maine 122, 71 Atl. 472.

[79]Whitlock v. Uhle, 75 Conn. 423, 53 Atl. 891.

[80]Gallagher v. Dodge, 48 Conn. 387, 40 Am. Rep. 182.

[81]Healey v. Spaulding, 104 Maine 122, 71 Atl. 472.

[82]Ingwersen v. Barry, 118 Cal. 342, 50 Pac. 536.

[83]Brostrom v. Lauppe, 179 Mass. 315, 60 N. E. 785.

[84]Jones v. Williams, 56 Wash. 588, 106 Pac. 166.

of both, chiefly in supporting the timbers used in construction of contiguous buildings on such estates, and it has been further held that strictly speaking a party wall is one built, or supposed to have been built at joint expense and upon ground owned in common so that each adjoining property has an undivided interest in every part of the wall and in the ground upon which it stands.[85] This definition is not in harmony with the general conception of the nature of the ownership in a party wall. The term more usually designates a dividing wall between two houses, to be used equally for all the purposes of an exterior wall by the respective owners, and divided longitudinally into two moieties, each moiety being subject to a cross easement in favor of the owner of the other moiety.[86]

The variance of these definitions leads at once to two conceptions of the nature of the ownership. A party wall has been defined as a wall of which the two adjoining owners are tenants in common,[87] (that is, such as hold by several and distinct titles but by unity of possession),[88] and which they therefore occupy promiscuously.[88a] No one of them is entitled to exclusive possession of any part, each being entitled to occupy the whole in common with others.[89] This however is not the general conception, and owners of a party wall standing partly on the land of each other are usually regarded not as tenants in common of the wall, but each is considered as owning in severalty, i. e. by sole separate and exclusive dominion of tenants,[89a] so much thereof as stands on his land, subject to the easement of the other owner for support and the equal use thereof as

[85]Scott v. Baird, 145 Mich. 116, 108 N. W. 737.

[86]Bellenot v. Laube, 104 Va. 842, 52 S. E. 698.

[87]Lederer v. Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357.

[88]Manhattan Real Estate. &c. Assn. v. Cudlipp, 80 App. Div. 532, 80 N. Y. S. 993.

[88a]Carver v. Fennimore, 116 Ind. 236, 19 N. E. 103.

[89]Carver v. Fennimore, 116 Ind. 236, 19 N. E. 103.

[89a]Funk v. Haldeman, 53 Pa. (3 P. F. Smith) 229.

an external wall of his building.[90] In Shiverich v. R. T. Gunning Co.[91] it is further held that the soil of each with the wall belonging to him is burdened with an easement or servitude in favor of the other to the end that it may afford a support to the wall and building of such other.

[§ 427.] (B) Structures Constituting Party Walls.—Although as ordinarily defined a party wall stands equally on the land of each of the adjoining owners, it need not necessarily be one-half on the lot of each, but may be entirely on one.[92] It should be capable of substantially similar use by each,[93] and a wall may be a party wall for a part of its height and cease to be for the remainder.[94] Where a wall is built on the boundary between two lots as a common foundation for two houses owned by a certain party the circumstances justify the inference that it is a party wall.[95] Every wall of separation between two buildings is presumed to be a common or party wall if the contrary is not shown, and this is not only a rule of positive ordinance,[96] but is a principle of ancient law.[97] Nevertheless the fact that a wall stands partly upon the property of each does not make it a party wall, nor does the fact that it is used by both of the adjoining owners make it such,[98] and the presumption may be rebutted.

[§ 428.] (C) Creation and Existence.—(1) By Agreement.—Party walls have no existence at common law[99] but

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[90]Springer v. Darlington, 207 Ill. 238, 69 N. E. 946; Everett v. Edwards, 149 Mass. 588, 22 N. E. 52, 5 L. R. A. 110, 14 Am. St. 462.

[91]58 Nebr. 24, 78 N. W. 460.

[92]Christensen v. Mann, 187 Wis. 567, 204 N. W. 499, 41 A. L. R. 1192; Dorsey v. Habersack, 84 Md. 117, 35 Atl. 96.

[93]Mercantile Library Co. v. University of Pennsylvania, 220 Pa. 328, 69 Atl. 861.

[94]Ringgold Lodge v. Dekalb Lodge, 157 Ky. 203, 162 S. W. 1111.

[95]Nippert v. Warneke, 128 Cal. 501, 61 Pac. 96, 270.

[96]Neilson v. Hummel, 280 Pa. 483, 124 Atl. 642.

[97]Weadock v. Champe, 193 Mich. 553, 160 N. W. 564.

[98]Mollenhauer v. Wolfe, 118 Misc. 390, 193 N. Y. S. 348.

[99]Fowler v. Koehler, 43 App. D. C. 349, Ann. Cas. 1916E, 1161.

may be created by agreement, statute or prescription.[1] An agreement authorizing either owner to build a party wall on the line, the other one using it to pay one-half the costs, and providing that "the said parties hereby convey to each other—such interest in the land covered or to be covered by said party wall as may be necessary to carry out the terms of this agreement" does not convey a fee simple, but merely gives an easement.[2] It is generally held that the grant of a party wall privilege creates an easement[3] which can be created only by writing or by prescription, which presupposes a grant,[4] but there is some authority that the right to use a party wall is a mere license, irrevocable when executed and need not be in writing.[5] Where the agreement has been executed it can not be revoked by either,[6] and where one party to the contract had erected a wall entirely on his own land, but had not sought to have the agreement voided, and had given no notice to his neighbor, the latter's grantee could use the wall as a party wall.[7]

[§ 429.] **(2) By prescription.**—"Prescription in the ancient sense of the word is founded upon the supposition of a grant."[8] Where a party wall has existed on the boundary line from time immemorial, it is presumed that the wall was constructed by agreement; and, in the absence of any express agreement, the rights of the parties will depend upon an implied agreement, and such implied agreement is that the wall shall remain as a support to each building;

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[1]Dunscomb v. Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. St. 915.

[2]Scottish-American Mtg. Co. v. Russell, 20 S. Dak. 42, 104 N. W. 607.

[3]Evans v. Pettus, 112 Ark. 572, 166 S. W. 955.

[4]Walker v. Shackelford, 49 Ark. 503, 5 S. W. 887, 4 Am. St. 61.

[5]Wickersham v. Orr, 9 Iowa 253, 74 Am. Dec. 348.

[6]Lukens v. Lasher, 202 Pa. 327, 51 Atl. 887.

[7]Knappenberger v. Fairchild, 210 Pa. 173, 59 Atl. 986.

[8]Parker (J) Gayetty v. Bethune, 14 Mass. 49, 7 Am. Dec. 188.

and if one of the owners desires to remodel or reconstruct his building, he must not injure the other's building.[9] A division wall between two buildings, having for the period of limitations been used for the support of both buildings, becomes in effect a party wall, whether or not originally constructed as such, and without an express agreement between the owners of the buildings,[10] for it is conducive to the peace of society that claims of right which for a long time have been acquiesced in and regarded as settled shall be protected by law,[11] but the use must be open and adverse.[12]

The use of a division wall by an adjoining owner or his acquiescence in the erection or use thereof by another may estop him from denying that such is a party wall,[13] but such use supported by an implied or oral license does not necessarily create an easement for licensee or his successors, for this would create without deed and in violation of the statute of frauds an interest in the land of the neighbor impairing his absolute title and subjecting his land to a servitude.[14] Where party wall rights are acquired by use during the statutory period, and there is no evidence of an agreement as to the use of the wall, the rights thus acquired are limited to the extent to which the wall has been used without any right to put a further burden thereon,[15] and that portion of the wall above or to the side of the used part is not a party wall.[16]

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[9]Bright v. Bacon, 131 Ky. 848, 116 S. W. 268, 20 L. R. A. (N. S.) 386.

[10]Weadock v. Champe, 193 Mich. 553, 160 N. W. 564.

[11]Putzel v. Drovers &c. Nat. Bank, 78 Md. 349, 28 Atl. 276, 22 L. R. A. 632, 44 Am. St. 298.

[12]Barry v. Edlavitch, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294; Spero v. Shultz, 14 App. Div. 423, 43 N. Y. S. 1016.

[13]Bank of Escondido v. Thomas, 108 Cal. XVII, 41 Pac. 462.

[14]Munter v. Kobre, 107 Misc. 261, 177 N. Y. S. 393.

[15]Bright v. Morgan, 218 Pa. 178, 67 Atl. 58.

[16]Mollenhauer v. Wolfe, 118 Misc. 390, 193 N. Y. S. 348.

[§ 430.] (3) **Effect of Sale by Owner.**—The severance of the ownership of two houses having a party wall on the line will put upon each house the burden and privilege of a party wall in absence of a clear reservation or grant to the contrary,[17] and where the deed reads "including one-half the wall thereof," the same will be considered a party wall although no mention is made of it as such.[18] In this regard it is well to note the distinction between an implied grant and an implied reservation. A deed is always construed most favorably to the grantee, and hence much may be implied, but the grantor is required to express his reservations. Thus where an owner of four lots each fifty (50) by one hundred forty (140) feet conveyed to a second party the south one-half of Lot Four—being twenty-five feet on Main Street and there was an eighteen-inch building wall along the north line of the south one-half of the lot, and entirely on the land conveyed, it was held that there was no implied reservation, and that the wall was not a party wall.[19] However the tendency of the courts is to discourage implied grants of easement, since the obvious result, especially in urban communities, is to fetter estates and retard buildings and improvements, and is in violation of the policy of recording acts.[20] Therefore care should be taken in conveyancing to state the status of a wall.

[§ 431.] (4) **Statutory Regulation.**—Statutes regulating party walls had their origin following the London fire in 1666 and were introduced into this country by the early settlers in Philadelphia under William Penn. In 1721 the Pennsylvania legislature enacted party wall statutes, and in 1794 similar ordinanc s were passed in Pittsburg. These

[17]Allen v. Evans, 161 Mass. 485, 37 N. E. 571; Heartt v. Kruger, 56 N. Y. Super. Ct. 382, 5 N. Y. S. 192, 25 N. Y. St. 686.

[18]Connelly v. Fish, 152 N. Y. S. 371.

[19]Cherry v. Brizzolara, 89 Ark. 309, 116 S. W. 668, 21 L. R. A. (N. S.) 508.

[20]Haas v. Brannon, 99 Okla. 94, 225 Pac. 931.

statutes are sustained by the police power of the state on the principle that equality is equity.[21] Although the weight of authority regards them as constitutional[22] and within the Fourteenth Amendment, there is doubt as to their validity,[23] and in a few jurisdictions they are held unconstitutional.[24] Their very nature necessitates interpretation according to the strict letter of the act.[25] When it is considered that party wall statutes allow an owner to go usually from four (4) to ten (10) inches over his line in constructing a wall, and that the wall erected may be useless, or even a hindrance to the adjoiner in the development of his property, the equality is more theoretical than practical. Justice Holmes of the United States Supreme Court in writing the decision in Jackman v. Rosenbaum Co.,[26] said, "Of course a case could be imagined where the modest mutualities of simple townspeople might become something very different when extended to buildings like those in modern New York" and further observed that there was a suggestion of such a difference in the case under consideration. The report does not give sufficient structural details to justify definite conclusions, but the few facts that are stated establish that the remark made by the learned jurist was applicable. The footings of the new wall in question were thirty-three (33) feet below the curb, and extended over the line seven and one-half (7½) feet. The statute involved was enacted in 1895, when skyscraper construction was in its infancy, and the spread of the footings leads one to surmise that the

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[21]Lederer v. Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357.

[22]Jackman v. Rosenbaum Co., 263 Pa. 158, 106 Atl. 238, affd. 260 U. S. 22, 67 L. ed. 107. 43 Sup. Ct. 9.

[23]Swift v. Calnan, 102 Iowa 206, 71 N. W. 233, 37 L. R. A. 462, 63 Am. St. 443.

[24]Wilkins v. Jewett, 139 Mass. 29, 29 N. E. 214. See also Traute v. White, 46 N. J. Eq. 437, 19 Atl. 196; Schmidt v. Lewis, 63 N. J. Eq. 565, 52 Atl. 707.

[25]Lederer v. Colonial Inv. Co., 130 Iowa 157, 106 N. W. 357.

[26]260 U. S. 22, 67 L. ed. 107, 43 Sup. Ct. 9.

building although not reaching the proportions of a skyscraper was of the frame rather than bearing wall type. This presumption is strengthened by the fact that the wall in question was only thirteen (13) inches thick at the curb level, clearly indicating that it was a curtain, rather than bearing wall. Although the court emphasized that the intrusion at the street level was only six and one-half (6½) inches, the fact remains that the footings were over the line seven and one-half (7½) feet. Beyond a shadow of doubt the decision is good law, but it is questionable whether the law is good. The scant facts of the record preclude a positive statement, but a study of the same leads to the belief that the plaintiff was the victim of society's negligence to keep its artificial creations of law abreast with progress. During the twenty years which had elapsed between the enacting of the ordinance and the construction of the offending building, a new type of architecture had developed and become commonplace.

The original application of the police power of the state in regard to party walls was as a means of reducing fire hazards, and this end may be attained by the regulation of the material and construction of the wall without regard to its relation to the building lines. Party wall statutes serve a useful purpose and should be included in every building code, but care should be taken to incorporate in them the flexibility found in zoning ordinances so that they do not become a drag or a tool to justify an unwarranted encroachment. Statutes drawn with land values of $50 to $100 a front foot in mind are not likely to be applicable to values ranging over $1,000 a foot. In general the statutes permit the construction of the wall over the line and provide for the apportionment of the cost when the adjoiner uses the wall.

[§ 432.] (D) Duration of Party Wall Easement.—An easement is a privilege without profit which one has for the benefit of his land in the land of another.[27] Its existence depends upon a dominant tenement to which the right belongs, and a servient tenement upon which the obligation is imposed.[28] An easement can survive the destruction of part of a servient estate when there is anything remaining upon which the dominant estate may operate,[29] but if that portion of the servient estate upon which the obligation of the easements rests is destroyed, nothing remains for the dominant estate to operate upon, and the easement ceases.[30] Therefore party wall rights attained by contract or prescription are terminated by the sudden destruction of the wall as by fire,[31] or by any agency beyond the control of either party.[32] In Mississippi it has been held that the easement is terminated where the buildings (or either of them) are destroyed without fault upon the part of the owner, although the wall may be left standing, unimpaired. This is based on the theory that the obligation ceases with the purpose for which it was assumed, namely the support of the houses of which the wall forms a part,[33] but the court has ruled to the contrary in a more recent case, where the circumstances were identical, and has held that the owner of the property destroyed has the right to rebuild the wall as a party wall.[34]

In Utah a divided court recognized that the accidental destruction of a wall terminates the easement and extinguishes all rights arising thereunder, but held that where

[27]Stovall v. Coggins Granite Co., 116 Ga. 376, 42 S. E. 723.

[28]Kellett v. Clayton &c. Road Co., 99 Cal. 210, 33 Pac. 885.

[29]Bonney v. Greenwood, 96 Maine 335, 52 Atl. 786.

[30]Shirley v. Crabb, 138 Ind. 200, 37 N. E. 130, 46 Am. St. 376.

[31]Bowhay v. Richards, 81 Nebr. 764, 116 N. W. 677, 19 L. R. A. (N. S.) 883; Heartt v. Kruger, 56 N. Y. Super. Ct. 382, 5 N. Y. S. 192, 25 N. Y. St. 686.

[32]Connelly v. Fish, 152 N. Y. S. 371.

[33]Hoffman v. Kuhn, 57 Miss. 746, 34 Am. Rep. 491.

[34]Lexington Lodge v. Beall, 94 Miss. 521, 49 So. 833.

a wall was damaged by fire to such an extent as to prohibit its use for a new building contemplated, but not sufficiently to render it useless as a support for the building left standing, the easement was not terminated.[35] Likewise in Tennessee it has been held that the easement endures as long as the wall is sufficient for the support of the house of one of the owners.[36]

The acts of the owners subsequent to the destruction of the party wall may raise the presumption that they contemplated the renewal of the easement. This is true where they rebuild as before,[37] but it is a question of intention as evidenced by acts, and very similar circumstances under different conditions may rebut the presumption.[38] It is more prudent to have an understanding and not rely upon the presumption. The easement may also be terminated by abandonment, as where one having an easement in a wall formerly a side of his building erects a new wall on a different foundation,[39] but mere non-use even for twenty years does not show abandonment;[40] and when the state of things which results in a contract for a particular party wall ceases and the right to continue an obligation for a party wall as between the owners of the adjoining properties is not provided by contract, the easements terminate.[41] Furthermore when by agreement the party wall agreement is destroyed and rescinded, and the consideration returned, the wall ceases to have any elements of a party wall.[42]

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[35]Commercial Nat. Bank v. Eccles, 43 Utah 91, 134 Pac. 614, 46 L. R. A. (N. S.) 1021, Ann. Cas. 1916C, 368.

[36]Blake Const. Co. v. Boyle, 140 Tenn. 166, 203 S. W. 945.

[37]Morrison Dept. Store Co. v. Lewis, 96 W. Va. 277, 122 S. E. 747; Douglas v. Coonley, 156 N. Y. 521, 51 N. E. 283, 66 Am. St. 580.

[38]Bonney v. Greenwood, 96 Maine 335, 52 Atl. 786.

[39]Duncan v. Rodecker, 90 Wis. 1, 62 N. W. 533.

[40]Eddy v. Chace, 140 Mass. 471, 5 N. E. 306.

[41]Bull v. Burton, 227 N. Y. 101, 124 N. E. 111.

[42]First M. E. Church v. Barr, 123 Wash. 425, 212 Pac. 546.

[§ 433.] (E) Rights, Duties, and Liabilities of Owners.—(1) In Respect to Construction.—In the absence of statutes there is no obligation upon an adjoining land owner to unite in the building of a party wall on the dividing line, and one land owner can not go upon the land of his neighbor and so place his wall.[43] Under statutes, however, either party may, in general, go upon the land of the other for the purpose of building a party wall, even without the latter's consent, and this right can not be taken away from him by the adjoining owner building exclusively on his own land either to the line or a short distance therefrom.[44] The right of entry is governed by the particular statute of the jurisdiction, and if, as in Iowa, the right is qualified by the provision that there be no wall on the line, prior improvements on the adjoiner's property preclude the builder from constructing a wall partially over his line.[45] The statutes usually limit the distance the wall may extend over the line (4½ to 9 inches) and provide that it shall be constructed one-half on the land of each,[46] but it has been held that this limitation does not apply to the footings and that the same may extend beyond the prescribed limits of the statutes.[47] Where a party wall is built under agreement without definite stipulation as to its proportions, or under statutes which do not definitely specify the details of construction, it should be of sufficient strength to support another building similar to the one of which it forms a part,[48] but need not be strong enough to support any kind of a building of heavier or greater dimensions which may

[43]Brooks v. Rosenbaum, 217 Mass. 172, 104 N. E. 469.

[44]Heron v. Houston, 217 Pa. 1, 66 Atl. 108, 118 Am. St. 898.

[45]Cornell v. Bickley, 85 Iowa 219, 52 N. W. 192.

[46]Schmidt v. Lewis, 63 N. J. Eq. 565, 52 Atl. 707; Switzer v. Davis, 97 Iowa 266, 66 N. W. 174.

[47]Heine v. Merrick, 41 La. Ann. 194, 5 So. 760, 6 So. 637; Jackman v. Rosenbaum Co., 260 U. S. 22, 67 L. ed. 107, 43 Sup. Ct. 9.

[48]Gilbert v. Woodruff, 40 Iowa 320.

be erected by the adjoining proprietor.[49] A party wall should meet all the building regulations regarding material, dimensions, and character.[50]

[§ 434.] (2) **In Respect to Repairs.**—Where a party wall becomes ruinous, one of the parties on due notice to the other may pull down and rebuild the wall,[51] and he is entitled to a contribution towards the expense from the other owner,[52] except for so much of the expense as arises from building the wall higher, or wider, etc., or of different material which must be borne by the party rebuilding.[53] It should be noted in this connection that this principle applies only to ordinary repairs due to deterioration and that where a party wall is destroyed by fire, there is no implied agreement, or legal obligation between the adjacent owners to rebuild the wall at their joint expense.[54]

[§ 435.] (3) **In Respect to Insufficiency.**—If from use or lapse of time a division wall becomes weakened or is partially destroyed either proprietor may repair or rebuild it, or may deepen its foundation and make such additions to it on his own land so as to fit it to bear the weight of a higher building provided its essential character is not changed;[55] and where one of the owners of a party wall desires to erect a new wall of more extensive dimensions on the site of the old wall, he may do so, but can not compel his co-owner to share the expense with him.[56]

The right to rebuild includes the right to demolish the old wall, to establish sufficient foundations, to disturb his

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[49]Dunscomb v. Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. St. 915; Gilbert v. Woodruff, 40 Iowa 320.

[50]Heine v. Merrick, 41 La. Ann. 194, 5 So. 760, 6 So. 637.

[51]Everett v. Edwards, 149 Mass. 588, 22 N. E. 52, 5 L. R. A. 110, 14 Am. St. 462.

[52]Bellenot v. Laube, 104 Va. 842, 52 S. E. 698.

[53]Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570.

[54]Antomarchi v. Russell, 63 Ala. 356, 35 Am. Rep. 40. See § 432.

[55]Fleming v. Cohen, 186 Mass. 323, 71 N. E. 563.

[56]Hawkes v. Hoffman, 56 Wash. 120, 105 Pac. 156, 24 L. R. A. (N. S.) 1038.

neighbor's enjoyment, to enter his premises to perform the work, and in some jurisdictions the owner rebuilding is not liable for damages resulting from the reconstruction of the wall in a reasonable and workmanlike manner,[57] but only for such as result from negligence.[58] However in some states the right to rebuild a party wall is conditional upon the co-owner being reimbursed for the necessary expense in protecting his property during the change,[59] and for any damage caused by the alteration or addition to the wall when not required for the purpose of repair.[60] General custom in a locality is an important factor in regard to the liability of the rebuilding owner, and it has been held that a landowner in tearing down a building need not protect a party wall so as to prevent rain from going through it. Omission of such protection is negligence only if general custom makes it so.[61]

[§ 436.] (4) In Respect to Use by Non-Building Owner.—Where under a party wall agreement an owner contracts to pay one-half the cost of the construction of a party wall erected by his neighbor when he uses the wall, the money becomes due when he proceeds to join his building to the wall,[62] and he acquires title to the wall as soon as under the terms of the contract he becomes liable to pay the agreed consideration or assumes responsibilities in relation to the wall irrespective of the question of payment.[63] An owner who without any agreement and in the absence of statutory provisions builds a wall partly on his own land and partly on the land of his neighbor is not entitled to contribution, even though the neighbor subse-

[57]Heine v. Merrick, 41 La. Ann. 194, 5 So. 760, 6 So. 637.

[58]Lexington Lodge v. Beall, 94 Miss. 521, 49 So. 833.

[59]Putzel v. Drovers &c. Nat. Bank, 78 Md. 349, 28 Atl. 276, 22 L. R. A. 632, 44 Am. St. 298.

[60]Fleming v. Cohen, 186 Mass. 323, 71 N. E. 563, 104 Am. St. 572.

[61]Thompson v. DeLong, 267 Pa. 212, 110 Atl. 251, 9 A. L. R. 1326.

[62]Kuh v. O'Reilly, 261 Ill. 437, 104 N. E. 5, 51 L. R. A. (N. S.) 420.

[63]Hill v. Huron, 33 S. Dak. 324, 145 N. W. 570.

quently uses the wall,[64] for at common law a person dispossessed becomes absolutely entitled to all improvements without paying anything for them when they are made without his request or sanction, and if a stranger dispossesses him or enters upon his unoccupied property, erects buildings and makes valuable permanent improvements upon it, he is not under the slightest obligation to recompense such stranger for any part of the expense upon recovering possession of the land.[65] However where the wall has stood over the line for more than the statutory period, the builder acquires title to the land supporting it by limitation, and the adjoiner is liable for the payment of one-half the cost of the construction thereof when he uses the same.[66]

The party wall statutes in many jurisdictions provide for the payment of one-half the construction costs when the non-building owner uses the wall; and it has been held that until the latter pays his share of the cost, the wall is not one in common but the exclusive property of the builder.[67]

[§ 437.] (5) In Respect to Windows and Openings.—A written contract for the construction of a party wall which makes no provisions for openings therein requires the wall to be built solid for its entire length and height,[68] and the sale of a wall with windows in it does not imply a reservation by the grantor to use of wall as it then exists,[69] or an easement for light and air in favor of the grantor, for such an easement never passes by implication.[69a] But where the party wall is made such by prescription, the easement is limited to the actual use, and windows may be

[64]Barnes v. Spurch, 121 Wash. 338, 209 Pac. 513, 212 Pac. 583.

[65]Nilson v. Kahn, 314 Ill. 275, 145 N. E. 340.

[66]Conner v. Joy (Tex. Civ. App.), 150 S. W. 485.

[67]Cordill v. Israel, 130 La. 138, 57 So. 778, 39 L. R. A. (N. S.) 931.

[68]Finch v. Theiss, 267 Ill. 65, 107 N. E. 898.

[69]DeBaum v. Moore, 32 App. Div. 397, 52 N. Y. S. 1092.

[69a]De Paun v. Moore, 32 App. Div. 397, 52 N. Y. S. 1092. See § 413.

placed in the portion not used as a party wall, especially where similar windows have existed for years.[70] The paramount object for which a party wall is constructed is the maintenance and support of adjacent buildings. In certain cities (New York) it is also the custom in constructing such walls between dwelling houses to place therein flues for the use of adjoining buildings,[71] but where party wall flues are built for the exclusive use of one house, the adjoining owner has no easement therein and can not connect thereto,[72] even though the flue may rest in part upon his land. That the flue is for the exclusive use of one particular owner may be indicated by its position in the wall, but where a flue in the lower story was entirely over the land of one owner, but in the upper stories was centered in the wall, it was held as intended for common use.[73] Where the owner of premises erects a building and party wall and leaves a flue projecting from such wall upon one of the lots where it stands open to view, and the owner than sells the two lots by separate conveyances to different purchasers, neither of them has the right to close up such flue, as the easement to maintain it is obvious and apparent, necessary and continuous.[74]

[§ 438.] (F) Rights and Liabilities of Successors in Title.—(1) Payment for use.—There is considerable conflict of authority even in the same state as to whether party wall agreements are personal or run with the land, and the decisions are in irreconcilable conflict and almost equally divided.[75] Considerable of this conflict is removed if it is recognized that there are two distinct classes of

[70]Mollenhauer v. Wolfe, 118 Misc. 390, 193 N. Y. S. 348.

[71]Horenburger v. Topper, 133 N. Y. S. 358.

[72]Batt v. Kelly, 75 App. Div. 321, 78 N. Y. S. 142; Koolbeck v. Baughn, 126 Iowa 194, 101 N. W. 860.

[73]Weill v. Baker, 39 La. Ann. 1102, 3 So. 361.

[74]Ingals v. Plamondon, 75 Ill. 118.

[75]Dunscomb v. Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. Rep. 915; Loyal Mystic Legion v. Jones, 73 Nebr. 342, 102 N. W. 621.

such agreements; (1) where it is apparent that the payment is to be made to the builder of the wall, and there are no words indicating that the right to receive payment shall pass to the purchaser or assignee; (2) where the language used declares the covenant to be perpetual and to be binding upon the parties and their heirs and assigns, thus clearly passing the right to receive payment when used to the grantees of the builders.[76] The first type may be converted into the second by stipulating in conveyances that the covenant is to run with the land, and that those claiming under the party erecting the wall are entitled to payment from those claiming under the adjoiner.[77]

Although the recent trend of decisions is that the benefits as well as the burdens of party wall agreements are covenants running with the land[78] the authority to the contrary is so extensive[79] that the intention should be clearly expressed in all agreements and in the conveyances of all lands so encumbered. Unquestionably the simplest and in this regard the best law holds that when the adjoining owner utilizes a wall under the terms of an agreement providing for compensation, the owner holding as grantee of the "first builder" becomes vested with the right to recover the amount agreed upon in the contract.[80]

In some jurisdictions where the statutes provide that the "first builder" is to be compensated to the amount of one-half the cost of the wall by his adjoiner, when the latter uses the same, it has been definitely held that the first builder's vendee is entitled to such payment.[81] In Delaware

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[76]Hoffman v. Dickson, 47 Wash. 431, 92 Pac. 272, 93 Pac. 523, 125 Am. St. 907.

[77]Ellensburg Lodge v. Collins, 68 Wash. 94, 122 Pac. 602.

[78]Jones v. Monroe (Tex. Com. App.), 285 S. W. 1055.

[79]Cook v. Paul, 4 Nebr. (Unoff.) 93, 93 N. W. 430, 66 L. R. A. 673; Dunscomb v. Randolph, 107 Tenn. 89, 64 S. W. 21, 89 Am. Rep. 915.

[80]Hill v. Huron, 33 S. Dak. 324, 145 N. W. 570; 39 S. Dak. 530, 165 N. W. 534.

[81]Halpine v Barr, 10 Mackey (21 D. C.) 331.

the term "first builder" as used in the statute has been interpreted to mean the owner whether he became such by building the wall in person, or hiring it done by another, or by purchasing it with the lot after it was built, and it has been held that the moiety to be paid by the last builder upon using the wall is due the owner of the first building at the time of the erection of the second. The right of compensation in this state is regarded as a right annexed to and passing with the building, and not as a personal claim.[82] In New Jersey the defendant in a certain case built a party wall in accordance with the local statutes partly on his own land, and partly on the adjoining lot not then owned by him. He subsequently conveyed the house to the complainant and later acquired title to the adjoining lot and when building attempted to use the party wall. The complainant brought suit in equity to restrain such use before the paying of one moiety of the value of the wall as provided in the statutes. The defendant claimed that as he conveyed to the complainant one-half of the wall only, his right to the other half was unimpaired, that by virtue of the statute he was entitled to the remuneration provided for; that this right was a personal right which did not pass by his deed, and that his grantor acquired no right to such remuneration by virtue of the grant, but the court held the right to payment inures not to the owner of the building at the time of its erection, but to the owner at the time the party wall is used for support of the building on the adjoining lot; that it is not a personal claim, but a right which passes with the ownership of the party wall standing on the adjoining lot, and that whatever other easements may exist incident to the structure, including the right to compensation for the use of the wall pass

[82]Pfrommer v. Taylor, 4 Boyce (27 Del.) 113, 86 Atl. 212.

by the deed as appurtenant to the land conveyed.[83] When the right to compensation runs with the land and is converted into a right for immediate compensation by the adjoiners use of the wall, such right does not pass by a subsequent conveyance, for to extend the same beyond the ownership at the time of use would lead to confusion and uncertainty.[84]

[§ 439.] (2) **Necessity of Notice.**—The recording of a party wall agreement is constructive notice to bind purchasers to its terms.[85] A party wall standing upon a lot at the time of its purchase constitutes an apparent sign of servitude, and is sufficient of itself to put a purchaser on inquiry as to what is the nature of the servitude,[86] especially where the purchaser continues to use the wall as it has been used by his grantor.[87] Nevertheless there is some authority to the contrary, and it has been held that the knowledge on the part of the purchaser that a wall is erected on the dividing line is not notice to him that he must contribute to the expense of building the wall in case he makes use of it,[88] but such decisions do not seem to be in line with the general rule as to the effect of occupancy as notice.[89]

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[83]Hunt v. Ambruster, 17 N. J. Eq. 208. See also Voight v. Wallace, 179 Pa. 520, 36 Atl. 315.

[84]Lea v. Jones, 209 Pa. 22, 57 Atl. 1113.

[85]McCormick v. Stoneheart (Tex. Civ. App.), 195 S. W. 883; Garmire v. Willy, 36 Nebr. 340, 54 N. W. 562.

[86]Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178.

[87]Lorenzi v. Star Market Co., 19 Idaho 674, 115 Pac. 490, 35 L. R. A. (N. S.) 1142.

[88]Hawkes v. Hoffman, 56 Wash. 120, 105 Pac. 156, 24 L. R. A. (N. S.) 1038.

[89]Hanson v. Beaulieu, 145 Minn. 119, 176 N. W. 178.

INDEX

[References are to Sections.]

A

ABANDONMENT,
affirmative act must support, 387.
burden of proof, 386.
defined, 386.
diversion or misuse does not constitute, 388.
intention to return may overcome temporary absence, 342.
time element an important consideration, 387.

ABATEMENT,
encroachments, 400.

ACCEPTANCE,
See DEDICATION.
acts constituting, 373.
destroys right to revoke, 380.1.
essential for dedication, 369.
general public, acceptance by, 370.
municipality, acceptance by, 371.
parties competent to accept, 372.
statutory regulations, 374.
time element important, 369.
unnecessary in certain jurisdictions, 374.

ACCESS TO WATER,
riparian rights, 290.

ACCRETION,
apportionment, 297.
artificial aids affect rights, 296.
avulsion, contrasted with, 280.
defined, 292.
fee in bed effects title to accretions, 295.
grantor may retain right to accretions upon submerged lands, 295.
islands formed upon stream beds, 294, 295.
ownership, 293, 295.
presumption always in favor of, 298.

[References are to Sections.]

ACQUIESCENCE,
agreement inferred, 323.
defined, 323.
holding to true line prevents, 324.
ignorance of parties affects, 324.
injury essential for operation, 323.
knowledge essential for operation, 318, 324.
overcome by repudiation, 324.
presumption that improvements were on line warranted, 324.
statutory period running, effect, 325.
strong evidence of establishment, 323.
time strengthens, 325.

ACTUAL POSSESSION,
See ADVERSE POSSESSION.
defined, 336.
essential for constructive possession under color of title, 351.
evidence by residence, 336.
extends constructive possession, 351.
nature dependent upon circumstances, 336.
necessary regardless of color of title, 336.
payment of taxes does not constitute, 336.
rightful owner's possession overcomes all constructive possession, 341, 351.
survey, insufficient to establish, 336.

ADJOINER,
call a safety factor, 168.
call for line must be made in deed, 169, 175.
call made upon conjecture, 177.
certainty of line important, 86, 176.1.
character of line, control dependent upon, 167, 170, 171, 172.
considerations necessary for control, 101.1, 102, 173, 174, 175, 176, 176.1.
constitutes a bound, 182.1.
control dependent upon call, 175.
course and distance, control over, 102, 164, 167, 170.
control overcome by, 102, 171, 173, 177, 178, 179.
departure from deed calls, effect, 178, 187.
error in call overcomes control, 169.
established as a bound by plat, 163, 164.
evidence of expressed intention, 168.
existence of line at time of deed affects control, 176.
expressed intention overcoming, 177, 179.

[References are to Sections.]

ADJOINER—Continued.
importance of call, 168.
intention to recognize line of adjoiner essential for control, 168, 174, 177.
line erroneously identified, 85, 169, 177.
location fixed by true line not line of occupation, 174.
marked but of uncertain identity, 85.
natural boundary, 168.
natural monument, 101, 167.
occupancy of land affects control, 173, 174.
plat determining control, 174.
plat overcoming controlling effect, 159, 160.
quantity, control over, 181, 182.
unmarked line, 85, 112, 164, 168, 171, 172, 180.
visibility as affecting control, 85, 164, 168, 171, 172, 180.

ADJOINING LAND OWNERS,
See Fences; Party Walls; Trees.
basis of damages for injuries to property, 394.
blasting, 397.
boundary dispute does not justify removal of fence, 422.
care, precaution, and skill expected of excavator, 406, 407, 408.
change in methods of excavation affects responsibility, 409.
damages for encroachments, 400.
dangerous conditions make owners liable, 412.
doctrine of ancient lights does not prevail, 413.
easement for light and air supported only by absolute necessity, 413.
ejectment, test of right to maintain action, 399.
embankments, 396.
encroachments, 398-400.
definition, 398.
may ripen into easement, 399.
nature, 399.
ownership, 400.
removal, 400.
test for right to maintain action, 399.
excavator not responsible for damage to improvements unless negligent, 407.
gate defined, 416.
implied easements, 403, 430.
lateral support, 401-407.
excavator's duties and liability, 406, 407.

[References are to Pages.]

ADJOINING LAND OWNERS—Continued.
lateral support, non-adjacent land, 405.
prescription, rule against acquisition by, 407.
removal, violation of property right, 406.
soil in natural state, 401, 406.
liability for contractor's negligence, 395.
license for excavator to enter adjoiner's premises, 411.
negligence in maintenance of dangerous materials, 412.
negligent excavator responsible for damage, 411.
negligence may warrant excavator's shoring adjoiner's building, 410.
negligent use of property, 395.
notice does not relieve excavator of duty to use care, 409.
notice to adjoiner of intention to excavate, 409.
obstructions, 396.
owner may treat encroachment as disseisin or trespass, 399.
owner's liability for causing water, etc., to pass upon neighbor's land, 412.
owner must support building from danger from adjoiner's excavation, 411.
ownership of encroachments, 400.
promise to use particular care imposes no duty to use unusual caution, 410.
removal of landmark unlawful, 423.
right to light and air, 413.
rights and duties in general, 394.
rights of owner encroached upon, 398.
shoring not required of excavator, 410.
statutes relative to right of support for improvements, 411.
supervision of contractor's work does not necessarily make owner responsible, 395.
test for permissible use of property, 394.
underpinning of adjoiner's building required of excavator, 408.
unskilful and negligent use of property, 395.
use of light and air from over neighbor's property not adverse, 413.
windows overlooking land of grantor do not support implied easement for light and air, 413.
wrongful use of property, 396.

ADJUSTMENT,
See Course and Distance.
conflicting courses and distances, 189-198.

[References are to Sections.]

ADJUSTMENT—Continued.
course and distance give control to intention, 196.
foundation of rational adjustment between course and distance, 197.
survey, 131.

ADVERSE POSSESSION,
abandonment overcome by intention to return, 432.
acquisition of property by continued hostile possession, 356.
actual possession extends constructive possession, 351.
actual possession not established by entry and survey, 336.
affirmative acts of city may cause estoppel to operate against self, 347.
agreements may interrupt, 342.
apportionment of excess and deficiency overcome by statute of limitations, 220.
basis, 335.
boundaries of constructive possession defined, 351.
business relationships affect hostility, 339.
cemetery lands, 347.
church properties, 347.
circumstances affect requirements of actual possession, 336.
city conditions, 336.
color of title, 344, 345, 349, 350.
actual possession necessary, 336.
continuity of possession necessary, 340.
defined, 344.
extends constructive possession, 345, 351.
justifies hostility, 339.
not essential, 345.
potential constructive possession, 352.
shortens necessary period, 345.
writing necessary to pass, 340.
consequences of acceptance by municipalities, 371.
constructive notice unnecessary, 337.
constructive possession, 351.
contiguous lots amalgamated by description, 351.
lappage, 353, 354.
lot divided by natural boundary, 351.
noncontiguous lots conveyed by one instrument, 351.
separate tracts, 351, 355.
several lots under one enclosure, 351.

[References are to Sections.]

ADVERSE POSSESSION—Continued.
constructive possession, single lot, 351.
under color of title dependent upon entry, 352.
contiguity of lots essential to extend constructive possession, 351.
continuity, 340.
cuts off right to recover property, 335, 356.
death of owner not an interruption, 341.
defined, 335.
eaves may affect exclusiveness, 338.
enclosure as evidence of actual possession, 336.
entry need not be hostile, 339.
entry under color of title creates constructive possession, 35[illegible]
evidence establishing good faith, 346.
exclusive possession, 338.
exclusiveness does not imply hostility, 339.
extent not limited by uncalled-for natural boundary, 351.
extent under claim of title, 349.
extent under color of title, 350.
family relationships affect hostility, 339.
fire not necessarily an interruption, 342.
good faith, 346.
hostility, 339.
improvements evidence of actual possession, 336.
intention to return affects abandonment, 432.
interruption, 341-343.
appointment of receiver, effect, 341.
claimant interrupting, 342.
death, 341.
entry, 341.
fire, 342.
permissive entries, 341.
third party interrupting, 343.
vacancies, effect, 342.
junior patent void to extent of conflict, 354.
lappage considered a separate tract, 354.
lappage must be actual, 355.
law places constructive possession in rightful owner, 341.
legal actions, 341.
right not essential for hostility, 339.
malevolence not essential for hostility, 339.
marked boundary may extend possession under claim of title, 349.

[References are to Sections.]

ADVERSE POSSESSION—Continued.
necessary elements, 336, 337, 338, 339, 340, 346.
necessity for actual possession, 336.
nonresident may acquire property by adverse possession, 348.
notoriety may affect extent of constructive possession, 351.
notorious possession, 337.
occupation evidence of actual possession, 336.
occupation of land for partition fence permissive, 420.
offer to purchase title not necessarily interruption, 342.
owner must have benefit of notoriety, 337.
owner's title extinguished, 356.
owner's title must be threatened by hostility, 339.
ownership defined, 352.
parties against whom statutes do not operate, 347.
parties who may acquire property by adverse possession, 348.
payment of taxes, 336.
peaceful possession, 340.
permissive entries no interruption, 341.
permissive use does not overcome exclusiveness, 338.
possession defined, 352.
possessions which may be tacked, 340.
presents most doubtful and litigated questions of law, 335.
presumptions always favor true owner, 335.
privity necessary for tacking, 340.
purpose of doctrine, 335.
purpose of privity, 340.
railroad lands other than right of way, 347.
recognition of title constitutes interruption, 342.
right or title acquired, 356.
rightful owner's possession overcomes constructive possession, 351.
rightful owner warned of claim by notoriety, 337.
seisin defined, 352.
seisin follows rightful title, 338, 349, 351.
subdivision affects extent of constructive possession, 351.
successive entries must be related to original for tacking, 340.
surveys as interruptions, 341.
tacking defined, 340.
tenant's acts may constitute actual possession of principal, 336.
tenant's possession not hostile to landlord, 339.
unoccupied land in constructive possession of true owner, 351.
use by others overcomes exclusiveness, 338.

[References are to Sections.]

ADVERSE POSSESSION—Continued.
use of light and air from over neighbor's property not adverse, 413.
vacancies when temporary cause no interruption, 342.
vests title in disseisor, 335, 336.

AFFIRMATIVE ACTS OF CITY,
estoppel by, 347.

AIR,
doctrine of ancient lights does not prevail in United States, 413, 414.
malicious interference with prohibited, 424.

ALLUVION,
See RIPARIAN BOUNDARIES.
definition, 292.
distinguished from avulsion, 298.

APPORTIONMENT,
accretions, 297.
land in bed of vacated street, 275.

APPORTIONMENT OF EXCESS AND DEFICIENCY,
adverse possession affects application, 220.
applied as last resort, 226.
color of title may affect, 220, 350.
conditions necessary for application, 217.
conveyance by lot and block number subjects grant to apportionment, 217, 220, 350.
course and distance of grant overcomes application, 225.
improvements affect application, 220.
irregularity of lot does not affect application, 223.
limitation, 218.
lines are moved from original position by application, 226.
lines of original survey overcome application, 218, 220.
location of discrepancy overcomes application, 224.
reasons for rule, 216.
rule, 215.
seniority of grant overcomes application, 225.
streets modify application, 218, 219.
time element affects application, 220, 226.
undimensioned lot overcomes application, 222.

ARBITRATORS' DECISION,
See ESTABLISHMENT.
binding, 326.
grounds for impeachment, 326.

[References are to Sections.]

ARTIFICIAL AIDS,
See RIPARIAN BOUNDARIES.
right to accretion, 296.

ARTIFICIAL MONUMENTS,
See MONUMENTS, ARTIFICIAL.

ARTIFICIAL WATERS,
boundaries, 288.

AVULSION,
contrasted with accretion, 280.
defined, 298.
differentiated from accretion, 298.
effect upon boundaries, 298.

B

BANK AND BED OF RIVER,
definition, 283.

BATTURE,
definition, 292.

BED OF RIVER,
effect of ownership upon title to accretions, 295.

BEARINGS,
calculated from observed angles, 55.
control between conflicting course and distance, 198.
error in transcription not revealed by bearings alone, 55.
geometric check no assurance of correctness, 198.
magnetic, 198.
true, 198.
true bearing obtained from lines of superior control, 55, 58.

BLASTING,
See ADJOINING LAND OWNERS.
rights and liabilities, 397.

BOUNDARIES,
constructive possession limited by boundaries under color of title, 351.
street as of date of deed determines lot line, 267.

BOUNDARY CONTROL,
ancient methods, 25, 26.
statement of problem, 26.

[References are to Sections.]

BOUNDARY CONTROL BY ENGINEERING METHODS.
accuracy, 30.
adjustments necessary in deed writing, 43.
advantages, 34.
availability, 46.
conveyancing by lot and block number, 47.
coordinates isolated subdivisions, 33, 39.
coordinate system, 29.
cost, 32.
deed descriptions simplified, 35.
disadvantages, 42.
diversity of use, 32.
elimination of errors and mistakes, 31.
foundation for cadastral maps, 40.
harmony of monuments, 37.
identity of monuments, 37.
initial application, 44, 46.
initial monument, 29.
legal foundation, 45.
lost monuments easily replaced, 41.
modern traversing and triangulation, 29.
necessity, 33.
practical precision, 30.
present use, 47.
primary, secondary, and tertiary control, 29, 31.
private monuments tied to system, 39.
private properties afforded stability and coordination, 39.
quantitative data controlling, 43.
rectangular system, 29.
relative precision, 29.
stability of monuments, 36.
stabilizes property lines, 39.
subdivisions, 33, 39.
time necessary for application, 44.

BOUNDARY CONTROL BY LEGAL METHOD.
background, characteristics, limitations, 27, 28.

BOUNDARY LINES.
direction and distance essential, 54, 57.
direction given by bearing, 55.

"BOUNDED ON."
fee carried to center of way, 230.

[References are to Sections.]

BOUNDS,
definition, 182.1.

C

CADASTRAL MAPS,
based on horizontal control, 40.

CALLS,
See Particular Call.
circumstances determine control, 65, 66, 74, 119, 132, 179, 198.

CEMETERY LANDS,
acquisition by adverse possession prohibited, 347.

CERTAINTY,
control determined by, 16, 98, 120.

CHURCH PROPERTY,
acquisition by adverse possession, 347.

CIRCUMSTANCES,
overcome control of adjoiner, 179.
surrounding transaction may affect control between course and distance, 198.

CITY,
acquisition of property adversely, 348.
action to prevent diversion, 392.
adverse possession does not operate against municipality, 347.
estoppel may be asserted against municipality, 347.
retains fee to land in street, 235.2.

CITY SURVEYS,
local conditions may overcome rules of construction, 74, 148, 204.

COLOR OF TITLE,
See Adverse Possession.
actual possession essential for constructive possession, 351.
actual possession of part extends constructive possession, 351.
adverse possession does not require, 345.
affects apportionment of excess and deficiency, 220, 350.
boundaries of instrument define limits of constructive possession, 351.
constitutes potential constructive possession, 352.
continuity not affected, 340.
county line may limit constructive possession, 351.
defined, 344.

[References are to Sections.]

COLOR OF TITLE—Continued.
description amalgamating contiguous lots extends constructive possession, 351.
description must be certain, 350.
extends constructive possession, 345.
extent of adverse possession defined, 350.
extent of constructive possession not limited by natural uncalled for boundary, 351.
good title unnecessary, 344.
justifies hostility, 339.
owner's possession overcomes all other constructive possessions, 351.
possession necessary to make color of title effective, 345.
shortens period for adverse possession, 345.
writing necessary to pass, 340.

COMMON LAW DEDICATION,
See DEDICATION.
acts constituting, 363.
confers easement, 362, 377, 378.

CONDEMNATION PROCEEDINGS,
fee in street left in adjoiner, 233.

CONDITIONS AS OF DATE OF DEED,
construction determined by, 66, 138, 151, 266-268.

CONFLICT BETWEEN FIELD NOTES AND PLAT,
effect, 158.

CONFLICTING BOUNDARIES,
construction and effect, 22, 306, 355.

CONFLICTING GRANTS,
actual possession determines control, 211.
senior controls, 210, 218, 225.
senior grant when floating may yield to junior, 211.

CONFLICTING SURVEYS,
office survey controls subsequent field survey, 212.
senior office survey may yield to junior field survey, 212.
senior survey controls, 212.

CONSIDERATION,
dedication need not be supported by, 360.

[References are to Sections.]

CONSISTENCY,
control determined by, 66.

CONSTRUCTIVE NOTICE,
adverse possession, 337.

CONSTRUCTIVE POSSESSION,
See ADVERSE POSSESSION.
actual possession essential to create constructive possession, 351.
dependent upon color of title, 349.
extends to limits of contiguous lots amalgamated, 351.
extent not limited by uncalled for natural boundary, 351.
junior does not have constructive possession of lappage, 354.
notoriety of claim may affect extent, 351.
overlap always in constructive possession of senior, 353.
unoccupied land in true owner, 341, 351.

CONTIGUITY,
essential for adverse possession, 339, 340.
extension of constructive possession, 351.
possession of vacant land is in holder of title, 340.

CONTIGUOUS LOTS,
description in color of title amalgamating lots extends constructive possession, 351.

CONTRACT FOR SALE,
executory instrument voided by subsequent deed, 207.

CORPORATION,
adverse possession operates against, 347.
dedication by acts of officers, 361.
may acquire property by adverse possession, 348.

COUNTY,
adverse possession does not run against county, 347.
estoppel may be asserted against county, 347.

COUNTY LINE,
constructive possession, limitation, 351.

COURSE AND DISTANCE,
adjoiner, control by, 102, 171, 173, 177-179, 187.
adjustment between, 189-198.
based on situation survey, 197.
confined to one correction, 198.

[References are to Sections.]

COURSE AND DISTANCE—Continued.
adjustment between, corroborative evidence strengthens theoretical adjustment, 198.
course generally less subject to error, 188, 194.
error of closure may locate blunder, 198.
factors which affect control, 198.
foundation for rational adjustment, 197.
geometric check of bearings no assurance of correctness, 198.
inversion of figures may determine, 192, 198.
irrational method, 195.
monuments determine control, 193.
necessitates use of mathematics and judgment, 194.
occupancy affects, 191.
omitted measurements affect, 198.
rational method, 196-198.
rule for, 189.
shape of figure may affect, 198.
suggestions for, 198.
survey foundation for, 197.
uncertainty of one element affects, 190.
under specific conditions, 198.
affect construction of call for shore, 285.
along street line may carry fee to center, 241.
blunder renders theoretical adjustment impossible, 194, 198.
both observed quantities, 194.
city conditions affect control, 74, 148, 204.
control, 183, 184.
conflicting monuments determined by course and distance, 127.
error established, 193.
evident error shown, 192.
one element uncertain, 190.
over quantity, 199, 200.
primarily negative, 183, 184.
superior call not made, 185.
superior call erroneous, 187.
destroyed monuments, control over, 100.
doubtful monuments, control over, 186.
erroneous in not reaching supposed adjoiner, 169.
erroneous monuments, control over, 99, 152.
map dimensions not controlling, 155, 161.
merely descriptive terms, 194.

[References are to Sections.]

COURSE AND DISTANCE—Continued.
neither more significant, 194.
overcomes apportionment of excess and deficiency, 225.
party wall, call for overcome by, 148.
relative probability of error, 188.

COURSES,
alone insufficient to lay down definite polygon, 194.

D

DAMAGES,
encroachments, 400.
foundation, 394.
incurred by blasting, 397.

DATA,
deed descriptions, 24, 43.

DATE OF DEED,
effect on instruction, 66, 151, 266-268.

DEATH OF RIGHTFUL OWNER,
adverse possession not interrupted, 341.

DEDICATION,
abandonment, 386.
misuse, effect, 388.
nonuse, effect, 386, 387.
acceptance, 368.
acts constituting, 373.
affects title to bed of street, 234, 362, 366.
general public, acceptance by, 370.
municipal officers, acceptance by, 371.
not necessary in certain jurisdictions, 374.
acknowledgment essential element of statutory dedication, 367.
acts constituting acceptance, 373.
administrator can not dedicate, 361.
assent of all interested parties necessary for change in use, 391.
bed of street, rights of owner, 378.
capacity of accepting body, 372.
capacity to dedicate, 361.
common-law dedication, 362, 363.
characteristics, 362.
confers an easement, 234, 362.
requires no grantee, 362.

[References are to Sections.]

DEDICATION—Continued.
consideration not necessary, 360.
control of improvements rests in public, 376.
conveyance by reference to plat constitutes dedication, 363, 366.
corporation may dedicate, 361.
dedicator, rights of, 378.
defective acknowledgment may be overcome, 367.
defined, 360.
distinguished from prescription, adverse possession, license, and private easement, 362.
diversion and misuse defined, 388.
uses which are, 389, 390.
diversion not an abandonment, 388.
diversion requires interference with use, 388.
easement presumed, 362, 377, 378.
effect of imposed conditions upon right of revocation, 384.
essential elements, 360.
extent, 364, 375, 377.
grading of dedicated streets, 379.
implication may support dedication, 363, 364.
implied invitation not a dedication, 362.
intention a necessary element, 364.
intention as established by map, 262, 364.
intention may be inferred, 364.
interference with use essential for diversion, 388.
interpretation of plats, 364.
liability incurred only by acceptance, 383.
liabilities of municipalities, 371.
license not a presumption of dedication, 377.
limitations, 376.
local conditions affect presumptions relative to intention, 377.
mortgagee has right to revoke dedication, 361.
municipality's duty to prevent diversion, 379, 392.
operation of common-law dedication, 362.
originates in act of dedicator, 362.
owner in fee must assent, 361.
owner, reserved rights, 360, 378.
parties competent to accept, 372.
parties who may maintain actions to prevent diversions, 392.
presumptions, 377.
proceedings to prevent diversion, 392.
proof of abandonment, 386.
proof of revocation, 385.

[References are to Sections.]

DEDICATION—Continued.
public generally, rights of, 379.
railroads can not acquire land by dedication, 362.
recording of defective plat not common-law dedication, 366.
recording of plat essential, 367.
regional planning affects operation, 360.
regional planning affects statutory regulations, 393.
regulation of platting, 33, 39, 365.
release by mortgagee a recognition, 361.
requisites of statutory dedication, 367.
revocation, 380.1, 381.
distinguished from acquisition of rights by public, 383.
in whole or in part, 385.
statutory regulations, 382, 385.
rights of dedicator, 378.
of owner, 378.
of public, 379.
of third party, 380.
risks assumed by public, 379.
sale by reference to plat ends right to revoke, 383.
sale by reference to plat merely offer to dedicate, 383.
several owners must all assent, 361.
statutory, 365.
defective operating as common-law dedication, 234.
may pass fee in street to public, 234, 366.
operates as a grant, 234, 366.
statutory regulations may render revocation impossible, 385.
statutory regulations relative to acceptance, 374.
statutory regulations relative to revocation, 382.
third persons, rights of, 380.
time element in abandonment, 387.
time element in acceptance, 369.
time element in general, 362.
trustee may dedicate, 361.
uses of dedicated land, 378, 379.

DEED CONSTRUCTION,
actual conditions determining, 256.
conditions as of date of deed determining, 66, 266, 267.
executory instrument renders contract of sale void, 207.
intention controls, 65.
object to effectuate intention, 66.
parol evidence to construe, 68.

[References are to Sections.]

DEED CONSTRUCTION—Continued.
parol evidence to construe, conflicts, 68.
explain, 69.
identify subject matter, 68.
not available to overcome intention, 70.
rules of construction subordinate to intention, 73.

DEED DESCRIPTIONS,
advantages of superior control, 59.
based on data from other deeds, 58.
by lot and block number, 35, 47.
subjects grant to apportionment, 217, 220, 350.
call for adjoiners may weaken, 58.
certain and definite calls control, 16, 97, 120, 122, 169, 218.
combined general and particular, 5.
complete description not limited by reference to another deed, 8.
conciseness impossible, 48.
conflict between adjacent properties, 22, 306, 355.
conflict does not overcome control of intention, 67.
construed against grantor, 6.
control between general and particular, 15.
corners referenced, 59.
direction and length of lines essential, 55, 56.
false call does not invalidate, 16.
faulty description rewritten, 25.
general, 3.
intention controls, 6, 65, 71, 109, 112, 117, 133, 174, 177.
length and direction of lines essential, 54, 57.
mathematics essential in writing, 25.
miscellaneous comments, 58.
"more or less" dimensions, 20, 56, 203.
ownership an aid in interpretation, 7.
particular, characteristics, 4.
point of beginning, 7, 50, 51, 52, 53, 197.
private monuments referenced, 59.
property within controlled area, 58.
quantitative data certain and reliable, 43.
quantitative data essential, 24.
reference to other instruments, 8, 9, 10, 11, 43, 58, 59, 65.
reference to plats, 13, 14.
rejection of false, 16, 17.
repugnancy, 15.
requirements for validity, 2.
reservation evidence of intention, 16.

[References are to Sections.]

DEED DESCRIPTIONS—Continued.
rule for writing, 49.
rules of construction yield to intention, 6, 65, 71, 109, 112, 117, 133, 174, 177.
source of survey data, 2, 18.
specifications for writing, 48.
substantial enclosure best muniment of boundary, 59.
types, 19.
uncontrolled area, 59.
value of ties, 59.

DEFINITE CALLS OF DEED,
control in description, 16, 186, 190.

DEFINITIONS,
abandonment, 386.
accretion, 292.
acquiescence, 323.
actual possession, 336.
adverse possession, 335, 336.
alluvion, 292.
avulsion, 298.
bank and bed of river, 283.
batture, 292.
bounds, 182.1.
color of title, 344.
"continuous" as applied to easements, 403.
dedication, 360.
dereliction, 292.
disseisin, 399.
diversion, 388.
easement, 432.
encroachment, 398.
estoppel, 313.
fences, 416.
first builder of party wall, 438.
gate, 416.
good faith, 346.
hostile possession, 339.
metes, 182.1.
misuse, 388.
monuments, artificial, 94, 129
monuments, natural, 93.
navigable, 283.

[References are to Sections.]

DEFINITIONS—Continued.
necessity, as applied to easements, 403.
notorious possession, 337.
ownership, 352.
party walls, 426.
peaceful possession, 370.
plat, 80, 82, 95, 154.
possession, 352.
practical location, 320.
privity, 340.
reliction, 292.
riparian owner, 289.
riparian rights, 289.
seisin, 352.
shore, 285.
"standing by" relative to establishment, 314.
tacking, 340.
thread of lake or river, 283.
trespass, 399.

DIRECTION AND DISTANCE,
essential elements of boundary line, 55, 56.

DISCREPANCIES,
may arise from true errors or blunders, 194.

DISPOSSESSED OWNER,
See ENCROACHMENTS—ADJOINING LAND OWNERS.
entitled to all improvements, 436.

DISPUTE,
does not justify removal of fence, 422.

DISSEISIN,
defined, 399.

DISTANCE,
alone does not define a line, 55, 194.
proper use of more or less, 56, 203.

DIVERSION,
assent of all interested necessary for change in use, 391.
defined, 388.
municipality should maintain action to prevent, 392.
parties who may maintain action to prevent diversion, 392.

[References are to Sections.]

DIVERSION—Continued.
proceedings to prevent misuse, 392.
uses which are consistent with dedication, 390.
uses which are diversions, 389.

E

EASEMENT,
See Dedication; Party Walls.
"continuous" as applied to easements defined, 403.
dedication presumed an easement, 377.
defined, 432.
duration, 432.
eaves may affect exclusiveness, 338.
encroachment may ripen into easement, 399.
fence may be built along right of way, 419.
fire terminates a party wall easement, 432.
implied, 403.
for light and air not supported by windows, 413.
necessity as applied to easements defined, 403.

EJECTMENT,
See Adverse Possession; Encroachments; Adjoining Land Owners.
owner must recover on strength of his own title, 339.
test for right to maintain action, 399.

EMBANKMENTS,
See Adjoining Land Owner.
wrongful uses, 396.

ENCROACHMENT,
See Adjoining Land Owner.
abatement, 400.
defined, 398.
may ripen into an easement, 399.
nature, 399.
owner may treat as disseisin or trespass, 399.
ownership, 400.
removal, 400.
test for right to maintain action, 399.

ENTRY,
See Adverse Possession.
in adverse possession need not be hostile, 339.
to interrupt adverse possession, 341.
under color of title creates a constructive possession, 352.

[References are to Sections.]

ERROR,
distinguished from blunder, 169.
may be adjusted, 194.
modify rules of construction, 86, 99, 118, 122, 136, 162, 169.
overcome control of adjoiners, 177.
source, 43, 188, 194.

ERROR OF CLOSURE,
aids in locating discrepancy, 198.

ESTABLISHMENT,
acquiescence, 323.
infers agreement, 323.
strengthened by time, 325.
strong evidence of recognition, 323.
warrants presumption that improvements mark line, 324.
active participation of ignorant party affects operation, 318.
agreements concerning line, 307-312.
accepting line known to be erroneous void, 308.
agreement to establish true line not satisfied by erroneous line, 307.
precludes acquiescence, 314.
binds only those making, 312.
contract for survey does not bind parties to line run, 326.
effective if true location of line is subsequently found, 307.
relative to true line, 318.
supported by courts, 307.
time effective, 311.
differentiated from adverse possession, 311.
elements necessary for establishment by agreement, 307.
erroneous representations essential for estoppel, 316.
erroneous representations estop grantee, 314.
established lines differentiated from original lines, 306.
estoppel defined, 313.
estoppel inoperative where knowledge is available, 319.
expenditures affect operation, 312.
fence not on line may become partition fence, 420.
formal agreements should be encouraged, 329.
foundation, 305.
fraudulent agreement not binding, 312.
ignorance of parties affects operation, 318, 324.
impeachment of arbitrators' decision, 326.
implied agreement, 309.
improvements affect operation, 312, 317.

[References are to Sections.]

ESTABLISHMENT—Continued.
improvements as evidence of practical location, 321.
injury essential for acquiescence, 324.
interference of grants unnecessary, 307.
knowledge essential for acquiescence, 324.
misrepresentations set estoppel in operation, 314.
mortgage affects operation, 310.
necessary elements of estoppel, 315.
operation of estoppel, 314.
original line differentiated from established line, 306.
parties affected by acquiescence, 325.
parties bound by agreements, 312.
parties competent to make agreements, 310.
practical location defined, 320.
practical location may be along a wrong line, 321.
practical location of grantor binding upon grantee, 322.
private surveys, 327.
purpose, 305.
removal of doubt a sufficient consideration, 311.
repudiation overcomes benefits of past acquiescence, 324.
silence affects operation of estoppel, 314, 318.
statutory proceedings, 328.
submission to arbitrators, 326.
title to land cannot pass by informal agreement, 308.
true location of line must be unknown, 307, 308.
uncertainty of location sufficient foundation, 307.

ESTOPPEL,
See ESTABLISHMENT; ADVERSE POSSESSION.
affirmative acts of city or county cause estoppel to operate against self, 347.
defined, 313.
erroneous representations essential for operation, 316.
erroneous representations estop grantee, 314.
ignorance affects operation, 318, 324.
necessary elements, 315.
operation, 314.
against the city, 347.
silence affects operation, 314, 324.

EXCAVATION,
See ADJOINING LAND OWNERS.
acquisition of right of support for improvements affects duty of excavator, 407.
adjacent land in natural condition, 406.

[References are to Sections.]

EXCAVATION—Continued.
negligence irrelevant where land is in natural condition, 406.
negligence necessary for damages where improvements exist, 407.
removal of lateral support violation of property right, 406.
responsibility of excavator, 406, 407, 408, 409, 410.
right of support for improvements not acquired by prescription, 407.
right to excavate where adjacent land is in natural condition, 406.
right to excavate where improvements adjoin, 407.
shoring of building not required of excavator, 410.
statutes modify common law regarding support of improvements, 411.

EXCESS AND DEFICIENCY,
apportionment, 217-226, 350.
adverse possession overcomes, 220.
affected by description by course and distance, 225.
color of title may affect, 220, 350.
conditions necessary for, 217.
conveyance by lot and block number subject grant to, 217, 220, 350.
course and distance of grant overcome, 225.
improvements affect rule of, 220.
irregularity of lot does not overcome, 223.
limitation of, 218.
lines of original survey overcome, 218, 220.
location of discrepancy overcomes, 224.
moves line from original position, 226.
rule of, 215.
reasons for, 216.
seniority of grant overcomes, 225.
streets limit application of, 218, 219.
time element affects, 220, 226.
to be applied as last resort, 226.
deficiency should be borne by original grantor, 226.
excess not in original grantor, 226.
undimensioned lot takes entire discrepancy, 222.

EXCLUSIVE POSSESSION,
hostility, 339.
permissive use by others does not overcome, 338.
use by others overcomes, 338.

[References are to Sections.]

EXPERIENCE,
application of rules, 177.

EXTENT,
adverse possession,
marked boundary may extend possession under claim of title, 349.
under claim of title, 349.
under color of title, 350, 351.
dedication, 364, 375.

F

FALSE CALLS,
deed description not invalidated, 16.
rejection, 16, 17.

FEE IN BANK,
See RIPARIAN BOUNDARIES.
determines ownership of riparian rights, 289.

FEE IN BED OF STREET,
See STREETS.
circumstances carry title beyond center line, 274.
conveyance by city or state, 235.2.
conveyance by reference to plat, 235.1.
establishment affects, 232, 233, 234, 235, 378.
general rule, 104, 230, 244.
highway along shore, 238.
highway on margin of land, 237.
limitations and modifications of general rules, 236.
limited to extension of side lines, 275.
may pass when course and distance call for side lines, 241.
purpose of reference in grant affects, 245.
retained by call for side lines, 243.
reversion, 272-275.

FENCES,
agreements relative to partition fences may be made by owners, 419.
agreements relative to partition fences may follow land, 419.
along street line must terminate at property corner, 420.
apportionment for maintenance, 419.
boundary dispute does not justify removal, 422.

[References are to Sections.]

FENCES—Continued.
civil liability for destruction, 422.
cost of repairs a lien upon property of defaulting owner, 419.
criminal liability for destruction, 423.
defined, 416.
duty to maintain partition fence may arise from prescription, 419.
easement for way includes right to fence same, 419.
erroneously erected on land of another may be removed, 420.
gate defined, 416.
land occupied by fence must be reasonable, 420.
lawful fence defined, 418.
lawful fences may become common, 418.
legality of spite fences, 423, 424.
location of partition fence, 420.
material does not determine sufficiency, 417.
monuments, 111.
not on line may become partition fence, 420.
occupation of land for partition fences permissive, 420.
oral agreements regarding fences do not run with land, 419.
owner need not fence against cattle of others, 419.
ownership, 421.
partition fences, 419.
may belong to but one owner, 421.
more than half upon land of one may be removed by him, 422.
presumed to belong to adjoiners, 421.
removal unlawful, 423.
spite fences, 424.
held a nuisance, 424.
held legal, 424.
statutory provisions, 418, 419.
regarding height, 425.
sufficiency of fence, 418.
waiver by agreement, 419.
sufficiency as determined by common law, 417.

FOOTSTEPS OF SURVEYOR,
followed in making survey, 113.
overcome apportionment, 218.

[References are to Sections.]

FORMULAS,
judgment necessary in application, 177.
fraudulent representation,
established by magnitude of discrepancy, 168.
relative to quantity, 43.
use of "more or less" affects, 203.

G

GATE,
See FENCES.
defined, 416.

GENERAL DESCRIPTION,
characteristics, 3.
must apply to one parcel only, 3.

GEOLOGICAL FORMATIONS,
affect right to blast, 397.

GOOD FAITH,
See ADVERSE POSSESSION.
color of title unnecessary to establish honesty of claim, 346.
defined, 346.
evidence establishing, 346.
necessary for adverse possession, 346.

GRANT,
extension by reference to other instrument, 9.
limitation by reference to other instruments, 10.

GRANTOR,
can not derogate from his own grant, 403.

GREAT LAKES,
See RIPARIAN BOUNDARIES.
as boundary lines, 286.

H

HIGH WATER,
non-tidal river, 283.
sea, 283.

HOSTILE POSSESSION,
See ADVERSE POSSESSION.
business relationship may overcome hostility, 339.
claimant must hold as owner, 339.

[References are to Sections.]

HOSTILE POSSESSION—Continued.
color of title justifies, 339.
defined, 339.
exclusive possession does not establish hostility, 339.
family relationships may overcome hostility, 339.
legal right not a necessary foundation, 339.
malevolence unnecessary, 339.
necessary element of adverse possession, 339.
need not date back to entry, 339.
owner's title must be opposed, 339.
tenants' possession inures to landlord, 340.
tenant's possession is subservient to landlords', 339.

I

IDENTIFICATION OF MONUMENTS,
established by course and distance, 114, 115, 132, 151, 285.
essential for control, 114, 131, 151, 184.
established by evidence, 114, 132.
established by measurements, 37, 115, 132, 256.

IGNORANCE,
establishment of bounuaries, effect, 318, 324.

IMPLIED GRANT,
See ADJOINING LAND OWNERS.
air and light, 413.
distinguished from reservation, 403.
lateral support, 403.
party wall, 430.

IMPROVEMENTS,
evidence of actual possession, 336.

INSTABILITY OF NATURAL MONUMENTS,
overcomes control, 93, 94.

INTENTION,
adjoiner in harmony controls although unmarked, 172.
call for adjoiner best evidence, 168.
controls adjustments between courses and distances, 196.
controls construction of deeds, 65, 66, 111, 151, 162, 174, 202, 209, 247.
determined by conveyance, 66.

[References are to Sections.]

INTENTION—Continued.
effect on rules of construction, 71.
essential element of dedication, 364.
established by lines marked and surveyed, 77.
established by reservation, 16.
monument in harmony controls although deficient, 172.
must be effectively expressed, 66.
overcomes control of adjoiners, 177, 179.
overcomes control of monuments, 117.
rule to determine, 66, 71, 72.

INVERSION OF FIGURES,
See COURSE AND DISTANCE.
explanation of error, 192, 198.

INTERRUPTION,
See ADVERSE POSSESSION.
abandonment may be overcome by intention to return, 342.
acts of owner, 341.
agreements relative to land adversely held may break continuity, 342.
claimants' acts, 342.
effect of death of owner, 341.
effect of legal actions, 341.
fire does not necessarily break continuity, 342.
offer to purchase title not necessarily interruption, 342.
owner's entry must give notice of claim of title, 341.
owner's entry must have characteristics essential for adverse possession, 341.
owner must enter to eject, 341.
permissive entries do not interrupt, 341.
recognition of title breaks continuity, 342.
surveys as acts of entry, 341.
third parties' acts, 343.
vacancy between occupancy of tenants does not break continuity, 342.

ISLANDS,
See RIPARIAN BOUNDARIES.
formation by accretion, 294.
ownership, 294, 295.

[References are to Sections.]

J

JUNIOR GRANTS,
deficiencies, 210, 218, 225.

JUNIOR PATENT,
void to extent of conflict, 211, 354.

L

LAKES,
See RIPARIAN BOUNDARIES.
artificial, 288.
boundaries, 286.

LANDMARKS,
natural monuments, 111.
removal unlawful, 423.

LAPPAGE,
See ADVERSE POSSESSION.
considered as a separate tract, 354.
constructive possession not in junior, 354.
junior patent void to extent of conflict, 354.
must be actual, 355.
street widening may create apparent lappages, 355.

LATERAL SUPPORT,
See ADJOINING LAND OWNERS.
excavations, duties and liabilities, 406, 407.
land in natural condition, 401, 406.
land with buildings, 402, 407.
non-adjacent land, 405.
prescription, rule against acquisition by, 404, 407.
removal violation of property right, 406.
right acquired by grant, 403.

LEGAL ACTIONS,
affect adverse possession, 341.

LIABILITY,
excavation, 406-410.
maintenance of streets incurred only by acceptance, 383.
negligent and unskilful use of property, 395.
owner does not incur through supervision of contractor's work, 395.

[References are to Sections.]

LICENSES,
permissive entries do not interrupt adverse possession, 341.
presumption of dedication, 377.

LIGHT,
doctrine of ancient lights does not prevail, 413.
malicious interference with prohibited, 424.

LIMITATIONS,
can not be imposed after dedication, 376.

LINES MARKED AND SURVEYED,
considerations necessary for control, 83.
adjoinders, 84-87.
course and distance, 88-90.
maps and plats, 80-83.
monuments, 77-79, 144.
control depends upon identity, 90.
control depends upon marking of line, 77, 79, 90.
control over quantity, 91.
established by stakes, 133.
location must be certain, 90.
overcome apportionment, 218, 220.
time of survey important, 90.

LOCAL CONDITIONS,
boundary control, 29.
city surveys, 45, 74, 170, 204.
control of conflicting calls, 65, 74, 119, 138, 148, 149, 198, 204.

LOCATION,
adjoiner yields to acknowledged location, 179.

LOT, UNDIMENSIONED,
takes entire discrepancy, 222.

M

MAGNETIC,
bearing, 198.

MAINE,
rule regulating sea as boundary, 285.

MAP,
See PLAT.

[References are to Sections.]

MARKED BOUNDARY,
may extend possession under claim of title, 349.

MASSACHUSETTS,
rule regarding sea as boundary, 285.

MEASUREMENTS,
identification of monument, 115, 1132.
method of making affects control between courses and distances, 198.

METES,
defined, 182.1.
may be omitted in valid deed, 182.1.
misrepresentations set estoppel in operation, 314.

MISTAKES,
adjustment, 194.

MISUSE,
of dedicated land defined, 388.
proceedings to prevent, 392.
uses which are consistent with dedication, 390.
uses which are diversions, 389.

MONUMENTED LAND,
constitutes a bound, 182.1.

MONUMENTS,
apportionment overcome by recognized monument, 218.
classification, 94.
control overcome by instability, 170.
destruction overcomes control, 93, 94, 100, 120
determine control between conflicting courses and distances, 193.
established by plat, 163, 164.
harmony, 37.
identity, 37.
initial, 29, 197.
necessary for locations of plats and maps on ground, 80.
original monuments best basis for survey, 76, 252.
party walls, 146, 147, 148, 149, 150.
plat ranked as a monument, 155.

MONUMENTS, ARTIFICIAL,
adjoiners, control over, 139, 140.
call for same essential for control, 141.

[References are to Sections.]

MONUMENTS, ARTIFICIAL—Continued.
considerations necessary for control, 139, 140, 141, 143, 151.
course and distance, control over, 95, 142, 144.
defined, 94, 129.
erected after conveyance, effect, 151.
identity, 131.
essential for control, 151.
intention as expressed controls monument, 152.
maps and plats, control over, 134-138.
overcome by error, 152.
overcome by course and distance, 100, 152, 186.
pipes, 131.
quantity, control over, 153.
stakes, 130.

MONUMENTS, NATURAL,
adjoiner's line is a monument, 101, 167.
call for same essential for control, 110, 114, 151.
certainty essential for control, 97, 120.
considerations necessary for control, 97, 98, 99, 100, 114, 116.
control between several, 122, 123.
determined by calls, 128.
determined by course and distance, 127.
determined by purpose, 126.
control dependent upon call, 97, 114, 116, 151.
control, how overcome, 77, 92-94, 98-100, 105, 117, 120.
artificial monument, 105.
definite and certain description, 98.
destruction, 93, 94, 100, 120.
evident error, 99.
expressed intention, 99, 117.
map or plat, 100.
marked lines, 77.
control over artificial, 103, 104.
control over course and distance, 95, 96, 111, 112, 113.
control over maps and plats, 106, 107, 108.
control over quantity, 121.
control strong, 92.
defined, 93.
identity aided by course and distance, 114, 115.
identity essential for control, 114.
identity established by evidence, 114.
intention clearly expressed overcomes control, 99, 117
permanence essential, 93.

[References are to Sections.]

MONUMENTS, NATURAL—Continued.
requisite properties, 93.
stability essential, 93, 94, 100.
street, 239.
visibility essential, 93, 120.

MONUMENTS, PRIVATE,
can be referred to controlled survey, 39.
conflict with one another, 37, 38.
lack harmony, 38.
lack identity, 37.

MONUMENTS, PUBLIC,
identified readily, 37.
in harmony with each other, 38.
more enduring than private, 36.

MORE OR LESS,
meaning, significance, effect, 203.
proper use, 56, 203.

MORTGAGE,
affects operating of estoppel, 310.

MORTGAGEE,
may by release recognize a dedication, 361.
right to revoke dedication, 361.

MUNICIPALITIES,
acceptance of dedication must be formal, 371.
adverse possession does not operate against municipalities, 347.
can not acquiesce, 325.
consequences of acceptance of dedication, 371.
estoppel may be asserted against city, 347.
may acquire property by adverse possession, 348.
should maintain action to prevent diversion, 379, 392.

N

NATURAL MONUMENTS,
See MONUMENTS, NATURAL.

NAVIGABLE,
defined, 283.
lake as boundary, 285.
river as boundary, 287.

[References are to Sections.]

NECESSITY,
definition as applied to easements, 403.

NEGLIGENCE,
adjoiner's negligence to shore building may warrant excavator shoring same, 410.
excavator responsible for damage to improvements caused by negligence, 411.
irrelevant in matter of support for land in natural condition, 406.
necessary to support damages to improvements from excavation of adjoiner, 409, 411.
renders owner responsible for damages to adjacent properties, 405.
use of property, 395.

NEW HAMPSHIRE,
rule regulating sea as boundary, 285.

NONRESIDENT,
acquisition of property by adverse possession, 348.

NOTICE,
change in methods of excavation necessitates second notice, 409.
does not relieve excavator of duty to use care and skill. 409.
excavator should give adjoiner notice, 409.

NOTORIETY,
constructive possession may be affected by notoriety, 351.

NOTORIOUS POSSESSION,
defined, 337.
necessary element of adverse possession, 337.
purpose, 337.

O

OBSTRUCTIONS,
wrongful uses, 396.

OCCUPATION,
effect upon boundaries, 173, 179, 191, 220, 259.
evidence of actual possession, 336.

OCEAN,
establishing boundary, 285.

OMITTED MEASUREMENT,
control as between conflicting course and distance, 198.

[References are to Sections.]

OPERATION,
common-law dedication, 362.
statutory dedication, 144.

ORIGINAL LINES,
differentiated from established lines, 306.

ORIGINAL LINES AND STAKES,
control over calls, 77, 80, 84, 88; 91, 144, 145.

ORIGINAL MONUMENTS,
best basis of survey, 76, 144, 145, 252.

OWNERSHIP,
defined, 352.
fences, 421.
party walls, 426.
trees near boundary, 414.

P

PAPER STREETS,
location, 109, 265.

PAROL EVIDENCE,
admissibility, 68, 69, 70.

PARTICULAR DESCRIPTIONS,
characteristics, 4.

PARTIES,
against whom adverse possession does not operate, 347.
who may acquire property by adverse possession, 348.

PARTITION PROCEEDINGS,
basis of application of excess and deficiency, 217.

PARTY WALLS,
abandonment of easement, 432.
agreement a covenant running with the land, 433.
agreement creates an easement, 428.
building code should be complied with, 433.
controls dimensional distances, 150.
course and distance affect control of call as monument, 115, 148.
creation by agreement, 428.
creation by prescription, 429.
defined, 426.

[References are to Sections.]

PARTY WALLS—Continued.
dispossessed owner entitled to all improvements erected on his land, 436.
easement endures during natural life of wall, 432.
easement terminated by destruction of wall may be renewed, 432.
extent of easement acquired by prescription, 429.
fire terminates easement, 432.
"first builder" construed to mean "owner," 438.
flues may be constructed in party walls, 437.
implied easements not favored by the courts, 430.
insufficient wall may be rebuilt, 435.
locative calls alone control course and distance, 147, 148.
local conditions affect foundation of statutes, 431.
monument, 146, 147, 148, 149, 150.
nature of ownership, 426.
occupancy of land by wall constructive notice of agreement, 439.
payment for use, 436, 438.
recording of agreement constructive notice, 439.
repairs, 434, 435.
rights and duties relative to construction, 433.
rights of builder replacing an insufficient wall, 435.
rights of owners in wall created by prescription, 429.
severance of houses having party walls, 430.
status of wall should be stated in grant, 430.
statute of limitations may render owner liable for payment for use of wall erected by adjoiner, 436.
statutory regulations, 431, 433.
based on theoretical equality, 431.
held constitutional, 431.
may qualify right to build, 433.
to be strictly construed, 431.
structural developments affect ancient statutes, 431.
structures constituting party walls, 427.
termination of easement, 432.
use by adjoiner, 429, 436, 438.
windows permitted when established by prescription, 437.
windows not permitted, 437.

PEACEFUL POSSESSION,
See ADVERSE POSSESSION.
definition, 370.

PERMANENCE,
essential quality of monuments, 93, 94, 100, 120.

[References are to Sections.]

PHYSICAL CHARACTERISTICS,
determine strength of monument, 93, 143.

PIPES,
use as monuments, 131.

PLAT,
accretion formed on submerged lots retained by platter, 295.
adjoiners, control over, 159, 160.
apportionment of accretion affected by plat, 297.
control as a monument, 155, 156, 263.
control dependent upon call, 157.
controls when necessary to locate grant, 157.
conveyance by map, 366.
course and distance, control over, 161, 162.
courses and distances of map not controlling, 155.
dedication, 364.
defined, 80, 82, 95, 154.
determines control between conflicting surveys, 263.
errors of transcription likely, 80, 154.
establishes monuments, 163, 164.
evidence of intention, 262.
evidence of street location, 261, 262, 263, 264.
field notes, control over, 158,
function, 80, 82, 95, 154.
identity of map, 14.
inaccurate map, 14.
interpretation, 80, 154, 223.
irregularity affects apportionment, 221.
location yields to actual, 264.
natural monuments control maps, 107, 108.
nonconformity to statutes does not overcome control, 14.
overcomes call for artificial monument, 141.
overcomes control of lines marked and surveyed, 83.
overcomes control of natural monuments, 109, 110.
pictorial representation, 80, 106, 154, 223.
quantity, control over, 165, 166.
ranked as a monument, 155, 263.
record of survey, 80, 154.
reference to plat affects fee in street, 235.2, 245.
reference to plat must be certain, 13.
regulation and supervision of subdividing, 33, 39, 365.

[References are to Sections.]

PLAT—Continued.
sale by reference to map, 383.
an offer to dedicate streets, 383.
ends right to revoke, 383.
scaling, 137, 222.

PLATTING,
affects constructive possession, 351.

POINT OF BEGINNING,
control no greater than that of other points, 50, 197.
controls location of grant, 50.
essential characteristics, 52, 53.
ideal physical characteristics, 52.
indefinite, 21, 51, 52.
location fixed by limits of possession, 7.
private monuments should be tied to superior control, 52, 53, 58.
satisfactory description, 53.
selection, 50.
simplicity desirable, 51.
survey impossible because of defective initial point, 50.

PONDS,
See Riparian Boundaries.
boundaries, 286.

POSSESSION,
See Adverse Possession.
actual change in possession necessary for interruption, 351.
actual possession essential to create constructive possession, 351.
defined, 352.
law places possession of vacant land in title owner, 340.
peaceful, defined, 370.

PRACTICAL LOCATION,
controls maps and plats, 137.
definition and essentials, 320.
grantor's recognition binding upon grantee, 322.
may be along a wrong line, 321.
may establish line, 322.

PRECAUTION,
requisite skill and care in excavation dependent upon circumstances, 407, 408.

PRECEDENTS,
reason for following, 27.
weakness revealed by contrast of cases, 177.

[References are to Sections.]

PRESCRIPTION,
See DEDICATION.
confers no right to lateral support, 404, 407.
confers only easement in street bed, 235.
founded upon supposition of a grant, 429.
imposes duty to maintain partition fence, 419.

PRESUMPTIONS,
accretion always presumed, 298.
dedication presumed an easement, 377.
relative to fee in street, 230, 242.

PRICE,
effect on control as between conflicting course and distance, 198.
may affect control of quantity, 204, 207.

PRIVACY,
not assured owner, 424.

PRIVATE MONUMENTS,
See MONUMENTS; BOUNDARY CONTROL.
lack stability, 21.

PRIVITY,
See ADVERSE POSSESSION.
defined, 340.
necessary for tacking, 340.
purpose, 340.

PROPERTY,
See ADJOINING LAND OWNERS.
negligent use, 395.
test for permissible use, 394.
unskillful use, 395.
wrongful use, 396.

PUBLIC,
acceptance of dedicated land, 370.
rights in dedicated land, 379.

Q

QUANTITATIVE DATA,
certain and reliable, 43.
cost reasonable, 43.
essential to locate grant, 24, 43.

QUANTITY,
agreement with one of two conflicting lines gives control to that line, 206.

[References are to Sections.]

QUANTITY—Continued.
controls in conveyancing of city lots, 204.
controls when course and distance carry grant beyond grantor's possessions, 202.
controls when it establishes the intention, 209.
controls when it is the essence of the contract, 202, 207.
controls when superior calls are lacking, 202, 205.
controls when superior calls are uncertain, 202.
deed description based on survey affects control, 208.
may be considered to determine boundaries, 201.
may be controlling, 201.
may determine control between conflicting course and distance, 192, 196, 198.
price may affect control, 204, 207.
set forth in contract yields to intention of deed, 207.
weak method of identification, 201.

R

RAILROAD CORPORATIONS,
may acquire property by adverse possession, 348.

RAILROAD LANDS,
See ADVERSE POSSESSION.
may be acquired by adverse possession under certain circumstances, 347.

RAILROADS,
right of way between water and upland affects riparian rights, 289.

RECEIVER,
appointment does not affect adverse possession, 341.

REFERENCE IN DEED,
for identification, 11.
for source of title, 11.
to other instruments, 8, 9, 11, 13, 58, 59, 63, 65.

REGIONAL PLANNING,
control of dedication, 360.
effect upon statutory dedication, 393.

[References are to Sections.]

REMOVAL,
encroachments, 400.
fences, 423.
landmarks, 423.

RESERVATION,
grant making, 403.
lateral support, 403.
party wall, 430.

RESIDENCE,
aids deed construction, 3.
evidence of actual possession, 336.

REVERSION,
See DEDICATION.
effect of establishment upon reversion of land in vacated street, 272, 273.

REVOCATION,
See DEDICATION.
acceptance ends right to revoke a dedication, 380.1.
acts revoking a dedication, 381.
burden of proof, 385.
distinguished from acquisition of rights by public, 383
effect of imposed conditions upon right to revoke, 384.
may be in whole or in part, 385.
sale by reference to plat ends right to revoke, 383.
statutory provisions relative to revocation, 382.
statutory provisions render it impossible to revoke, 385.

RIGHTFUL OWNERS,
actual possession overcomes all constructive possession, 351.
title alone creates constructive possession, 351.

RIGHT TO EXCAVATE,
adjacent land improved, 407.
adjacent land in natural condition, 406.
care and skill required, 408.
notice, 409.
statutory regulation, 411.

RIGHT TO LATERAL SUPPORT,
See ADJOINING LAND OWNERS.
acquired by grant, 403.
from non-adjacent land, 405.

[References are to Sections.]

RIGHT TO LATERAL SUPPORT—Continued.
land in natural condition, 401.
land with improvements, 402.
not acquired by prescription, 404.

RIGHT TO LIGHT AND AIR,
See ADJOINING LAND OWNERS.

RIPARIAN BOUNDARIES
accretion and avulsion differentiated, 280.
accretion defined, 292.
accretion to submerged lands may be retained by grantor, 295.
advantages, 280.
alluvion defined, 292.
apportionment of accretion, 297.
apportionment affected by plat, 297.
artificial aids affect right of accretion, 296.
artificial waters, 288.
avulsion defined, 298.
avulsion differentiated from accretion, 298.
avulsion must be proved, 298.
bank and bed of river defined, 283.
batture, 292.
course and distance affect construction of call for shore, 114, 115, 285.
dereliction defined, 292.
disadvantages, 280.
effect of avulsion, 298.
effect of erosion, 295.
fee in bed affects title to accretions, 295.
Great Lakes as a boundary, 286.
high water of non-tidal river and sea, 283.
instability, 280.
islands formed by accretion, 294, 295.
low water of non-tidal river and sea, 283.
Massachusetts, Maine, and New Hampshire rule regarding sea as boundary, 285.
monument may affect construction of call for shore, 285.
navigable lake as boundary, 286.
navigable river as boundary, 287.
ocean as boundary, 285.
ownership of accretion, 293-296.
particular terms "by the beach," "to the shore," etc., construed, 285, 287.

[References are to Sections.]

RIPARIAN BOUNDARIES—Continued.
presumptions favor accretions, 298.
reliction defined, 292.
river, 287.
rules regarding accretion and avulsion unsatisfactory, 280.
sea as a boundary, 285.
shore defined, 285.
state law governs, 281.
states' right to dispose of tidal lands, 299.
thread of lake, 283.
thread of river, 283.

RIPARIAN RIGHTS,
access to water, 290.
defined, 289.
dependent upon fee in bank, 289.
effect of right of way between water and upland, 289.
effect of street between water and upland, 289.
navigable, defined, 283.
reclamation, 291.
riparian owner defined, 289.

RIVER,
bank and bed defined, 283.
boundary lines, 287.
ownership of bed affects title to accretions, 295.
thread of, 283.
title to accretions dependent upon ownership of bank, 293.

RULES,
application of, 177.

RULES OF CONSTRUCTION,
flexibility, 65, 73, 74, 86, 119, 143, 177.
limitations, 73, 74.
permit discretion, 45.
statement, 72.

S

SEA,
See RIPARIAN BOUNDARY.
boundary lines, 285.

SEISIN,
defined, 352.
follows title, 341.

[References are to Sections.]

SENIORITY,
apportionment overcome by seniority of grant, 218, 225.

SHAPE OF FIGURE,
See COURSE AND DISTANCE.
effect on control between conflicting course and distance, 198.

SHORE,
See RIPARIAN BOUNDARIES.
course and distance may affect construction, 285.
defined, 285.

SILENCE,
may set estoppel in operation, 314.
standing by defined, 314.
with ignorance does not operate to party's prejudice, 318.

SKILL,
excavating owner, conditions as determining, 407, 408.

STABILITY,
effect upon control of monuments, 170.
essential quality of monuments, 93, 94.

STAKES,
See MONUMENTS; ARTIFICIAL.
evidence of surveyed and marked lines, 133.

STATE,
adverse possession does not operate against, 347.
may acquire property by adverse possession, 348.
may retain fee to land in street, 235.1.
right to grant tidal lands, 299.

STATUTORY DEDICATION,
See ADJOINING LAND OWNERS; DEDICATION; FENCES; PARTY WALLS.
acceptance, 374.
acknowledgment essential, 367.
operates as a grant, 366.
requisites, 367.
revocation, 382.

STATUTORY REGULATIONS,
excavation, 409, 411.
fences, 418, 419, 425.
party walls, 431, 433.
proceedings for establishing boundary, 328.

[References are to Sections.]

STREETS,
acceptance of dedication affects title to bed, 234.
affect apportionment of excess or deficiency, 218.
city may retain fee, 235.2.
common-law dedication leaves legal title in adjoining lot owner, 234.
common-law dedication gives public an easement in bed, 234, 362.
condemnation proceedings for establishment generally leave fee in lot owner, 233.
control over course and distance, 240.
conveyance by city or state, 235b.
conveyance by reference to plat, 235.1.
course and distance along side line may extend fee to center, 241.
curbs may determine location, 255.
deed construction controlled by location as of date of deed, 266, 267.
effect of street being unopened upon fee in bed, 246.
effect of street being vacated upon fee in bed, 245.
effect of vacation before conveyance of abutting lot, 245.
effect upon riparian rights when between water and upland, 289.
fee in bed,
circumstances carry title beyond center line, 274.
conveyance by city or state, 235.2.
conveyance by reference to plat, 235.1.
establishment affects, 232, 233, 234, 235, 366, 378.
general rule, 104, 230, 244.
highway along shore, 238.
highway on margin of land, 237.
limitations and modifications of general rules, 236.
limited to extension of side lines, 275.
may pass when course and distance call for side lines, 241.
purpose of reference in grant affects, 245.
retained by call for side lines, 243.
fence on street line must terminate at property corner, 420.
grantor's fee in bed passes to grantee, 104, 230, 244.
interior block lines may control survey from street lines, 268, 269.
location,
conflict between improvements and monuments, effect of, 256.
determination, 253-264.
by lines in adjacent blocks, 258.

[References are to Sections.]

STREETS—Continued.
location, determination, by lines of occupancy, 259.
by lines of private improvements, 257, 259.
by lines of public improvements, 255, 264.
by maps yields to improvements, 264.
by monuments, 253.
by plats, 261-264.
by recognized lines, 260.
establishment, effect of, 249-251.
by dedication, 250.
by prescription, 251.
by statutory proceedings, 249.
paper streets, 265.
lot lines fixed by street as of date of deed, 138, 267.
maintenance of lines, 248.
marginal way passes fee to grantee for full width, 236.
monument, 230, 239.
monumented street lines only satisfactory basis for private survey, 248.
occupancy of private properties fixes location, 257, 259.
physical characteristics determine control, 143.
plat reference affects title to fee in way, 235.1, 246.
plat reference carries fee of vacated street to grantee, 245, 246.
prescription gives public easement in bed, 235.
private improvements as evidence of location, 257, 259.
private ways, 247.
purpose of reference in grant affects title in bed, 245.
reason why grant extends to center line, 231.
re-establishment, 248.
re-establishment does not affect internal block lines, 268, 269.
reversion, 272, 273.
rights of adjoiners in bed, 234, 378.
shore may extend fee of lots on opposite side to entire bed, 238.
sidewalks not an essential part, 390.
state may retain fee to land, 235.2.
statutory dedication may pass fee to public, 234, 366.
survey from center or side lines controlled by quantity call, 270, 271.
surveying methods of locating, 252.
uses to which bed may be subjected, 390.
width cannot be changed after property is conveyed, 266.

SUBDIVISION,
affects constructive possession, 351.
control by planning commissions, 33.

[References are to Sections.]

SUPPORT,
See ADJOINING LAND OWNERS.
acquisition of right of support for improvements affects duty of excavator, 407.
change in methods of excavation affects responsibilities of excavator, 401.
excavator must support adjoiner's soil in natural condition, 406.
excavator should give adjoiner notice, 409.
improvements not entitled to support from adjoiner's land, 407.
license to enter adjoiner's premises must be given excavator, 411.
negligence of owner of adjoining building may warrant excavator shoring same, 410.
notice does not relieve excavator of duty to use due care, 409.
owner must support improvements from danger caused by adjoiner's excavation, 411.
prescription confers no right to support, 407.
promise to use particular care imposes no duty to use unusual caution, 410.
shoring of building is not required of excavator, 410.
statutes modify common law regarding support of improvements, 411.
underpinning required of excavator, 408.

SURVEY,
actual possession not established by survey, 336.
causes of inaccuracy, 43.
data obtained from deed, 2, 18.
deed description based upon survey may give quantity control, 207.
establishment of boundaries by private survey, 327.
foundation for determination of control between course and distance, 197.
interruption of possession, 341.
methods affect control between course and distance, 198.
methods based on rules of construction, 75, 76, 252.
monumented street lines best basis for private survey, 248.
purpose, 355.
related surveys may support apportionment, 217.

T

TACKING,
See ADVERSE POSSESSION.
character of prior possession affects benefits, 340.
defined, 340.

[References are to Sections.]

TACKING—Continued.
possessions which may be tacked, 340.
privity of possession necessary, 340.

TAXES,
payment does not constitute actual possession, 336.

TENANTS,
acts may constitute actual possession of principal, 336.
possession subservient to landlords, 339.

TERMINAL OF COURSE,
determines construction of call, 114, 115, 148, 285.

THREAD OF LAKE OR RIVER,
definition, 283.

TIME,
adjoiner to control must exist at time call is made, 176.
affects apportionment of excess and deficiency, 220, 226.
effect of date of deed, 66, 151, 266-268.
effect of vacation of street before sale of abutting lots, 245.
effect upon abandonment, 387.
important element in acceptance of dedication, 369.
not necessary element for dedication, 362.
simultaneous deeds basis of apportionment of excess and deficiency, 217.
strengthens operation of acquiescence, 325.

TITLE,
acquired by adverse possession, 356.

TREES,
adjoiner can not pick fruit from tree entirely on another's lot, 414.
injunction will be granted to prevent destruction of line tree, 415.
injurious to adjoiner's crops is continuing nuisance, 414.
line tree can not be destroyed by either owner, 415.
line tree may be pruned by either owner, 415.
owner may prune overhanging branches of adjoiner's tree, 414.
owner not liable for blowing over of sound tree, 412.
ownership of trees near boundary, 414.
ownership of trees on line, 415.

TRESPASS,
defined, 399.

[References are to Sections.]

TRUE BEARINGS,
obtained from lines of superior control, 55, 58.
use, 198.

TRUE OWNER,
See ADVERSE POSSESSION.
constructive possession of all unoccupied land, 351.

TRUSTEE,
adverse possession operates against, 347.
power to dedicate, 361.

U

UNDERPINNING,
required of excavating owner, 408.

UNDIMENSIONED LOT,
overcomes rule of apportionment of excess and deficiency, 218.

UNITED STATES,
adverse possession does not operate against, 347.
may acquire property by adverse possession, 348.

UNOCCUPIED LAND,
See ADVERSE POSSESSION.
constructive possession in true owner, 351.

UNSKILLFUL USE OF PROPERTY,
adjoining owners, 395.

USES,
dedicated property, 378, 379.
which are hot diversions of dedication, 390.
which constitute diversions of dedication, 389.

V

VACANCIES,
adverse possession not interrupted, 342.

VACATED STREETS,
reference to plat carries fee to grantee, 246.

VIEW,
right to obstruct, 413, 424.

VISIBILITY,
effect upon control of adjoiner, 171.
effect upon control of monument, 171.
essential quality of monuments, 93, 94, 120.
expressed intention overcomes invisibility, 172.

7975